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IN THE

Supreme Court of the United States

October Term 1953
No. 18

GEORGE EARL TOOLSON,

Petitioner,

vs.

NEW YORK YANKEES, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS.

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SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 1

Statutes involved 2

Statement of the case 2

The case allegedly stated by the complaint as amended 3

The questions presented 6

Summary of argument 9

Argument 13

I.

The unanimous decision of this Court in the *Federal Baseball* case was correct and is applicable to this case 13

(1) The *South-Eastern Underwriters* case, *Lorain Journal* case, and the *Mandeville Farms* case, do not overrule any of the underlying principles of the *Federal Baseball* case and are not inconsistent with it 20

South-Eastern Underwriters case (322 U. S. 533) analyzed 20

Lorain Journal case (342 U. S. 143) analyzed 25

Mandeville Farms case (334 U. S. 219) analyzed 27

(2) The sufficiency of the complaint is to be determined on the facts therein alleged, Petitioner's references to the Celler Report and to other facts outside the record are improper, but they do not in any event show that the Respondents are within the Sherman Act or that Petitioner is entitled to recover in a private treble damage action 28

PAGE

(3) The facts argued by Petitioner (not alleged in his complaint) that the giving of professional baseball exhibitions in different cities necessitates interstate communications do not show that the Court had jurisdiction of the subject matter of the action nor do they show a claim upon which relief can be granted..... 31

(a) Necessary interstate communications do not make the playing of professional baseball games an interstate activity 31

(b) Petitioner was in no way injured or damaged by the argued interstate activities of Respondents..... 32

(4) The giving of professional baseball games on a prearranged schedule which requires interstate travel of the players is not trade or commerce. So holding is not dissecting Respondents' business or disregarding the incidental interstate travel and communications necessary for the production of such games..... 32

Mandeville Farms case (334 U. S. 219) analyzed..... 33

(5) There is no analogy between the interstate lease, sale and transportation of motion picture films and the travel of baseball players between cities in different states for the purpose of holding, in the several states, exhibitions of professional baseball..... 36

(6) The fact that the play-by-play accounts of some professional baseball games are now reported by television and radio as well as by telegraph in no way affects the character of the game or changes it from a sport to trade or commerce or gives it any element of commercial competition or makes it an interstate activity..... 41

(a) The opinions of Judges Hand and Frank in *Gardella v. Chandler* (2d Cir., 1949), 172 F. 2d 402 (hereinafter referred to as the *Gardella* case) were erroneous and that of Judge Chase correct..... 47

PAGE

(7) No public policy requires this Court to decline to follow its decision in the *Federal Baseball* case..... 54

II.

The construction of the Sherman Act by this Court in the *Federal Baseball* case should not now be departed from, since it has stood unimpaired by court decision or congressional action for more than thirty years, during which persons engaged in professional baseball have acted, and are acting, in reliance upon it..... 59

III.

The complaint does not state a claim under the Anti-trust Statutes, even if the Court has jurisdiction of the subject matter 68

(1) The alleged restraints concerning radio and television and concerning league and club territories are not shown to have injured or damaged Petitioner..... 68

(2) The player regulations, which are the only restraints which are alleged to have damaged Petitioner, (a) do not restrain commercial competition, and agreements between employers as to the terms or conditions of employment of employees are not contrary to the common law or to the Anti-trust Statutes, (b) do not directly, substantially, or at all, affect interstate commerce, and (c) do not cause any injury to the public..... 71

(a) The player regulations do not restrain commercial competition. Agreements between employers as to the terms or conditions of employment of employees are not contrary to the common law or to Anti-trust Statutes 71

The courts recognize the distinction between competition for labor and commercial competition.... 72

PAGE

Agreements between employers as to rules regulating employment services are not violative of the Federal Anti-trust Laws 74-5

(b) The player regulations do not directly, substantially, or at all, affect interstate commerce 76

(c) The player regulations do not cause any injury to the public 77

IV.

The complaint alleges a labor dispute which is exempted from the Anti-trust Laws by provisions of the Clayton and Norris-LaGuardia Acts 79

Conclusion 84

Appendix—

Clayton Act:

Section 1 ..... App. p. 1

Section 6 ..... App. p. 1

Section 20 ..... App. p. 1

Norris-LaGuardia Act:

Section 13 (a) and (c) ..... App. p. 3

TABLE OF AUTHORITIES CITED

CASES	PAGE
A. J. Goodman & Son v. United Lacquer Mfg. Corp., 81 F. Supp. 890	70
Abouaf v. J. D. & A. B. Spreckels Co., 26 F. Supp. 830	77
American Cloak & Suit Mfrs. Ass'n v. Brooklyn Ladies' Garment Mfrs. Ass'n, 143 Misc. Rep. 319, 255 N. Y. Supp. 614	75
American League Baseball Club of New York, Inc. v. Pasquel, 187 Misc. Rep. 230, 63 N. Y. S. 2d 537	39, 40
American Medical Association v. United States, 317 U. S. 519	49, 50
Anderson v. United States, 171 U. S. 604	52
Androff v. Building Trades Employers' Ass'n, 83 Ind. App. 294, 148 N. E. 203	75
Apex Hosiery Co. v. Leader, 310 U. S. 469	49, 50, 56, 62, 63, 71, 75, 77, 78, 81, 82
Appalachian Coals, Inc. v. United States, 288 U. S. 344	77
Associated Hat Mfrs. v. Baird-Unteidt Co., 88 Conn. 332, 91 Atl. 373	75
Atkins v. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074	75
Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13	76
Beegle v. Thomson, 138 F. 2d 875	70
Bigelow v. RKO Radio Pictures, 327 U. S. 251	36, 49
Binderup v. Pathe Exchange, Inc., 263 U. S. 291	36, 49
Board of Trade v. United States, 246 U. S. 231	56
Chicago Board of Trade v. United States, 246 U. S. 231	77
Citizen Publishing Co. v. Merchants & Mfrs. Ass'n, 83 F. Supp. 994	77
City Trust, S. D. & S. Co. v. Waldhauer, 47 Misc. Rep. 7, 95 N. Y. Supp. 222	75
Conference of Studio Unions v. Loew's, Inc., 193 F. 2d 51; cert. den., 342 U. S. 919	50, 72, 74

PAGE

Conley v. San Carlo Opera Co., 163 F. 2d 310.....38, 39
Feddersen Motors v. Ward, 180 F. 2d 510..... 77
Federal Baseball Club v. National League, 259 U. S. 200.....
.....9, 11, 13, 14, 15, 16, 19, 20, 21, 25
26, 27, 29, 31, 32, 33, 36, 38, 41, 42, 46
47, 49, 51, 53, 58, 59, 61, 65, 66, 67, 84
Fisher's Blend Station v. Tax Commission, 297 U. S. 650.....43, 46
Forstmann & Huffman Co. v. United Front C. of T. Workers,
99 N. J. Eq. 230, 133 Atl. 202..... 75
Foster & Kleiser Co. v. Special Site Sign Co., 85 F. 2d 742..... 70
Franklin v. Skelly Oil Co., 141 F. 2d 568..... 8
Gardella v. Chandler, 172 F. 2d 402.....10, 11, 41, 47, 48, 51, 54, 58
Genecarella v. Fyfe, 171 F. 2d 419..... 8
Gerli v. Silk Ass'n of America, 36 F. 2d 959..... 70
Glenn Coal Co. v. Dickinson Fuel Co., 72 F. 2d 885.....70, 77
Goldfield Consol. Mines Co. v. Goldfield M. U. No. 220, 159
Fed. 500 75
Hart v. B. F. Keith Vaudeville Exchange, 12 F. 2d 341; cert.
den., 273 U. S. 704.....37, 38, 40
Helvering v. Griffiths, 318 U. S. 371..... 60
Herbert Bayard Swope, In re, 24 LRRM 1065.....44, 45, 61
Hooper v. California, 155 U. S. 648.....20, 21
Hopkins v. United States, 171 U. S. 578..... 52
Hunt v. Crumboch, 325 U. S. 821.....49, 55, 56
Hunt v. Riverside Co-operative Club, 140 Mich. 538, 104 N. W.
40 75
Industrial Assn. v. United States, 268 U. S. 64.....72, 75
Jack v. Armour & Co., 291 Fed. 741..... 70
Kowalski v. Chandler, 202 F. 2d 413..... 45
Leloup v. Port of Mobile, 127 U. S. 640..... 45
Levering & Garrigues Co. v. Morrin, 289 U. S. 103.....50, 72, 77
Lomax Transportation Co. v. United States, 183 F. 2d 331..... 8

PAGE

Lorain Journal Co. v. United States, 342 U. S. 143.....9, 25, 26
Los Angeles Turf Club, Inc., In the Matter of, 90 N. L. R. B. 20 61
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219.....9, 27, 33, 34, 35, 47, 77
Mutual, etc. Insurance Co. v. Tisdale, 91 U. S. 238..... 8
Myers v. Shell Oil Co., 96 F. Supp. 670.....70, 77
National Bank v. Whitney, 103 U. S. 99..... 60
National League, etc. v. Federal Baseball Club, 269 Fed. 681 .....17, 18, 58
Neugen v. Associated Chautauqua Co., 70 F. 2d 605..... 40
New York Life Insurance Company v. Deer Lodge County, 231 U. S. 495..... 21
North American Company v. Securities & Exchange Commission, 327 U. S. 686..... 20
Noyes v Parsons, 245 Fed. 689..... 70
Olympia Stadium Corporation, In Matter of, 85 N. L. R. B. 389 61
Paramount Famous Lasky Corporation v. United States, 282 U. S. 30 .....36, 49
Paul v. Virginia, 8 Wall. 168.....20, 21
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1..... 45
People v. Klaw, 55 Misc. Rep. 72, 106 N. Y. Supp. 341..... 40
People v. Newman, 109 Misc. Rep. 622, 180 N. Y. Supp. 892 40
Ring v. Spina, 148 F. 2d 647..... 38
San Carlo Opera Co. v. Conley, 72 F. Supp. 825..... 39
Schatte v. International Alliance, etc., 182 F. 2d 158.....50, 72
Shotkin v. General Electric Co., 171 F. 2d 236.....77, 78
State v. Employers of Labor, 102 Neb. 768, 169 N. W. 717..... 75
Toolson v. N. Y. Yankees, 101 F. Supp. 93.....1, 2, 67
Toolson v. N. Y. Yankees, 200 F. 2d 198.....1, 2

PAGE

Trade Press Pub. Co. v. Milwaukee Typographical Union, 180 Wis. 449, 193 N. W. 507 75

United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 265 U. S. 457 77

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 77

United States v. Aluminum Co., 1 F. R. D. 71 8

United States v. Crescent Amusement Co., 323 U. S. 173 37

United States v. E. C. Knight Co., 156 U. S. 1 33

United States v. Frankfort Distilleries, 324 U. S. 293 62

United States v. Gold, 115 F. 2d 236 ..... 50, 72, 75

United States v. Hutcheson, 312 U. S. 219 83

United States v. International Harvester Co., 274 U. S. 693 8

United States v. San Francisco Electrical Cont. Ass'n, 57 F. Supp. 57 70

United States v. South-Eastern Underwriters Assn., 322 U. S. 533 ..... 9, 20, 21, 22, 35, 47, 49, 63, 64

United States of America v. Title Insurance and Trust Company, 255 U. S. 472 60

Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17 59

Western Union Telegraph Co. v. Speight, 254 U. S. 17 46

Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 70

Williams v. Quill, 277 N. Y. 1, 12 N. E. 2d 547 75

BRIEF

Federal Baseball Club Brief 42

REPORT

House Subcommittee Report (Celler Report) 7, 8, 9, 29, 53

Senate Report No. 163, 72nd Cong., 1st Sess., p. 19 82

STATUTES	PAGE
Clayton Act, Sec. 1	2, 80
Clayton Act, Sec. 4	2, 68
Clayton Act, Sec. 6	2, 81
Clayton Act, Sec. 20	2, 80, 81, 82, 83
Norris-LaGuardia Act, Sec. 13	83
Norris-LaGuardia Act, Sec. 13(a)(c)	2, 82
Sherman Act, Sec. 1	2, 3, 4, 5, 14, 21, 51
Sherman Act, Sec. 2	2, 5, 14, 21, 51
Sherman Act, Sec. 3	51
United States Code, Title 15, Sec. 1	3
United States Code, Title 15, Sec. 15	7
United States Code, Title 15, Sec. 17	2, 36, 81
United States Code, Title 28, Sec. 1254	1
United States Code, Title 28, Sec. 2101(c)	1
United States Code, Title 29, Sec. 52	2, 79, 80
United States Code, Title 29, Sec. 53	2, 80
United States Code, Title 29, Secs. 101-115	79
United States Code, Title 29, Sec. 113(a)	2, 82
United States Code, Title 29, Sec. 113(c)	2, 82

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NEW YORK YANKEES, INC., *et al.*,

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court is reported at 101 F. Supp. 93. The opinion of the Court of Appeals for the Ninth Circuit is reported at 200 F. 2d 198.

JURISDICTION.

The jurisdiction of this Court has been invoked by the Petitioner under Title 28 U. S. C. §§ 1254 and 2101(c). (Pet. B. 3.)

STATUTES INVOLVED.

The pertinent provisions of Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act are set forth in Petitioner's brief at pages 2-3. If the Petitioner's construction of the foregoing sections were adopted, then Sections 1, 6, and 20 of the Clayton Act (15 U. S. C. 17, 29 U. S. C. 52, 53) and Section 13(a)(c) of the Norris-LaGuardia Act (29 U. S. C. 113(a) and (c)) would be involved. These statutes are set forth in full in the appendix to this Brief.

STATEMENT OF THE CASE.

The action was brought by Petitioner for treble damages for alleged violation of the Sherman Act [R. 3-19]. The District Court, upon motion of Respondents,* dismissed the action upon the separate and independent grounds (1) that the Court did not have jurisdiction over the subject matter of the action and (2), that, if the Court did have jurisdiction over the subject matter, the amended complaint failed to state a claim upon which relief can be granted. [R. 47-49; 101 F. Supp. 93]. The Court of Appeals for the Ninth Circuit, on December 12, 1952, affirmed the order on the grounds and for reasons stated in the opinion of the District Court. [R. 62; 200 F. 2d 198].

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*Although named as Defendants in the complaint, the American League of Professional Baseball Clubs, National League of Professional Baseball Clubs, National Association of Professional Baseball Leagues, George N. Trautman and Binghamton Exhibition Company, Inc., were not served with process and are not parties to the action. [R. 3, 47]. In this brief, the word "Respondents" includes only those named defendants who were served, and the word "Defendants" includes all named defendants.

THE CASE ALLEGEDLY STATED BY THE COMPLAINT AS AMENDED.

THE AMENDED COMPLAINT PURPORTS TO STATE THREE CLAIMS, BUT ACTUALLY STATES ONLY ONE ALLEGED CLAIM UPON THREE THEORIES.

The First Alleged Claim. The gist of Petitioner's first alleged claim is: the Defendants entered into a contract (known as the major-minor league agreement) which unreasonably restrained some unspecified line of interstate commerce in violation of Section 1 of the Sherman Act. (15 U. S. C. §1). This contract provided (1) that all player contracts in the minor leagues shall be in one form, and that each contract shall be assignable, shall grant the employing club or its assignee an option to renew and contain a covenant not to play for any club other than the employing club or its assignee, (2) that no club shall negotiate with a player under contract with, or on the reserve list of, another club without the latter club's express consent, (3) that a player who violates his contract or engages in certain other specified conduct, should be placed on the ineligible list, and (4) that a player on the ineligible list shall not be employed by or play for a club in professional baseball or be released from his contract, unless and until he shall have applied for and shall have obtained reinstatement from the ineligible list to the active list. [R. 9-10, par. XI.]**

While Petitioner was under contract with the Newark International Baseball Club, his contract was assigned to the Binghamton Exhibition Co., Inc., which was a

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**For brevity, the foregoing provisions of the alleged contract are hereinafter designated as the "player regulations".

named defendant but not served with process. Petitioner refused to report to the assignee club. On May 25, 1950, Petitioner, for this breach of his player contract, was placed on the ineligible list and was still on the ineligible list when the action was commenced. There is no allegation that Petitioner ever applied for, or was refused, reinstatement. Defendants have allegedly refused to allow Petitioner to play professional baseball while on the ineligible list and have thereby damaged Petitioner in the sum of $125,000. [R. 11, pars. XII, XIII]. From the foregoing, it is clear that Petitioner's damages, if any, are alleged to have been caused solely by reason of the enforcement of the player regulations set forth in the alleged contract among the Defendants with respect to their employment of baseball players.

The Second Alleged Claim. The second claim, as stated in the original complaint, incorporated by reference the allegations of the first claim and alleged that the Defendants had violated Section 1 of the Sherman Act by entering into a combination or conspiracy instead of a contract as alleged in the first claim.

Subsequently, the second claim was amended to allege that Defendants had also entered into (1) a combination or conspiracy to prescribe the circumstances in which, and the conditions upon which, the circuits of major and minor leagues may be changed, and (2) a combination or conspiracy to define the territory in which, and the circumstances upon which, major league clubs could sell rights to broadcast or telecast descriptions of their games outside of their home city or territory and in the home city or territory of other clubs, and to allege that each

of said combinations or conspiracies violated Section 1 of the Sherman Act. [R. 36-38].

Petitioner does not allege that he was, or is, engaged in giving professional baseball exhibitions or in the business of broadcasting or telecasting or that he was in any way damaged by either of the alleged combinations or conspiracies described in the preceding paragraph. Instead, Petitioner predicates his alleged damages upon his having been placed upon the ineligible list under the player regulations as alleged in his first claim. [R. 12-13, par. III].

The Third Alleged Claim. The third alleged claim, as amended, incorporates by reference the allegations of the first claim and alleges in substance the same facts that were alleged in the second claim, as amended; but alleges that such facts constitute a violation of Section 2 of the Sherman Act instead of violations of Section 1 of the Sherman Act, as alleged in the first and second claims. [R. 13, par. I, II-1; R. 18, par. III; R. 38-40].

Again, Petitioner does not allege in the third claim, either as originally drawn or as amended, that he was in any way injured or damaged by any of the alleged agreements of the Defendants as to the territorial rights of the various leagues or the alleged restraints upon broadcasting or telecasting, but bases his damages squarely upon his being placed upon the ineligible list. [R. 18-19, par. III].

THE QUESTIONS PRESENTED.

Petitioner's statement of the questions presented is both too narrow and too broad. It is too narrow because, even if the District Court had jurisdiction over the subject matter of the action, the question would still remain whether the District Court properly dismissed the complaint for failure to state a claim upon which relief can be granted. It is far too broad for the reasons hereinafter stated.

Petitioner states that the "single question presented by the case at bar" is whether the District Court has jurisdiction over the subject matter of the action. (Pet. B. 13). However, in a purported explanation or definition of the foregoing question, Petitioner erroneously asserts that such question is: "Are the activities and organization of professional baseball subject to the anti-trust laws," or "in other words, are these activities and this organization within the scope and meaning of the anti-trust laws?" (Pet. B. 13). This greatly overstates the scope and nature of that question.

First: Petitioner assumes that is must be held that either all or none of the activities in which persons in professional baseball engage, are within the scope of the Anti-trust Laws.

Second: The case at bar is a private statutory action in which only those alleged violations of the Anti-trust Laws, by which Petitioner is alleged to have been proximately damaged in his business or property, can be ad-

judicated or can be put in issue by the Petitioner. (15 U. S. C. §15). The only alleged violations of the Anti-trust Laws set forth in the complaint as amended, by which Petitioner allegedly was damaged, are the player regulations. Nevertheless Petitioner states his "single question presented" and argues the case, as though the action had been brought by the Government.

Third: Petitioner's argument is based largely, not upon the facts alleged in his complaint as amended, but instead upon facts, conclusions and opinions which are allegedly stated in a Report of a Subcommittee of the House of Representatives* and in a private article published in the Yale Law Journal. (Pet. B. 22-6, 38-9, 44). Statements of alleged fact, conclusions of fact and opinions contained in the Report of the House Subcommittee do not constitute findings, conclusions or opinions of the Congress or of the House or even of the House Committee.

Insofar as any of such facts or conclusions of fact are alleged in the complaint as amended, reliance upon their statement in extraneous documents can add nothing to Defendants' case and, instead only creates confusion and raises a collateral question as to whether, and to what extent, such facts are alleged in the complaint as amended.

Insofar as the facts and conclusions of fact allegedly stated in the Report or in the private article are not alleged in Petitioner's complaint as amended, they cannot

*Hereinafter referred to as the "Celler Report".

be considered in reviewing the judgment of the lower courts (1) because they are not alleged in the complaint as amended upon which the decisions of the lower courts are necessarily based, (2) because neither the Report nor the private article would even be admissible in evidence as proof of any facts or conclusions of fact stated in the Report or article (*United States v. International Harvester Co.* (1927), 274 U. S. 693, 703; *Lomax Transportation Co. v. United States* (9th Cir., 1950), 183 F. 2d 331, 334; *Mutual, etc. Insurance Co. v. Tisdale* (1875), 91 U. S. 238, 244-5; *Franklin v. Skelly Oil Co.* (10th Cir., 1944), 141 F. 2d 568, 572; *Genecarella v. Fyfe* (1st Cir., 1948), 171 F. 2d 419, 422-3; *United States v. Aluminum Co.* (S. D. N. Y. 1939), 1 F. R. D. 71), and (3) because if, although not alleged by Petitioner, any of such facts or conclusions of fact are claimed to be within the realm of judicial notice, such a claim could not be founded upon, or supported by, reference to the Report or private article.

The questions presented to this Court are: (1) Did the District Court have jurisdiction of the subject matter of the claims alleged in the complaint? (2) Did the complaint fail to state a claim upon which relief could be granted to Petitioner?

SUMMARY OF ARGUMENT.

I. The unanimous decision of this Court in *Federal Baseball Club v. National League* (1922), 259 U. S. 200 (hereinafter referred to as the *Federal Baseball* case), was correct and is applicable to this case. P. 13 to 20.

1. The cases of *United States v. South-Eastern Underwriters Association* (1944), 322 U. S. 533 (hereinafter referred to as the *South-Eastern Underwriters* case), *Lorain Journal Co. v. United States* (1951), 342 U. S. 143 (hereinafter referred to as the *Lorain Journal* case), and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U. S. 219 (hereinafter referred to as the *Mandeville Farms* case), do not overrule any of the underlying principles of the *Federal Baseball* case and are not inconsistent with it. P. 20 to 28.

2. The sufficiency of the complaint is to be determined on the facts therein alleged. Petitioner's references to the Celler Report and to other facts outside the record are improper, but they do not in any event show that the Respondents are within the Sherman Act or that Petitioner is entitled to recover in a private treble damage action. P. 28 to 30.

3. The facts argued by Petitioner (not alleged in his complaint) that the giving of professional baseball exhibitions in different cities necessitates interstate communications do not show that the Court had jurisdiction of the subject matter

of the action nor do they show a claim upon which relief can be granted. P. 31 to 32.

(a) Necessary interstate communications do not make the playing of professional baseball games an interstate activity. P. 31 to 32.

(b) Petitioner was in no way injured or damaged by the argued interstate activities of Defendants. P. 32.

4. The giving of professional baseball games on a prearranged schedule which requires interstate travel of the players is not trade or commerce. So holding is not dissecting Respondents' business or disregarding the incidental interstate travel and communications necessary for the production of such games. P. 32 to 35.

5. There is no analogy between the interstate lease, sale and transportation of motion picture films and the travel of baseball players between cities in different states for the purpose of holding, in the several states, exhibitions of professional baseball. P. 36 to 40.

6. The fact that the play-by-play accounts of some professional baseball games are now reported by television and radio as well as by telegraph in no way affects the character of the game or changes it from a sport to trade or commerce or gives it any element of commercial competition or makes it an interstate activity. P. 41 to 54.

(a) The opinions of Judges Hand and Frank in *Gardella v. Chandler* (2nd Cir., 1949),

172 F. 2d 402, (hereafter referred to as the *Gardella* case) were erroneous and that of Judge Chase correct. P. 47 to 54.

7. No public policy requires this Court to decline to follow its decision in the *Federal Baseball* case. P. 54 to 58.

II. The construction of the Sherman Act by this Court in the *Federal Baseball* case should not now be departed from, since it has stood unimpaired by court decision or congressional action for more than thirty years, during which persons engaged in professional baseball have acted and are acting, in reliance upon it. P. 59 to 67.

III. The complaint does not state a claim under the Anti-trust Statutes, even if the Court has jurisdiction of the subject matter. P. 68 to 78.

1. The alleged restraints concerning radio and television and concerning league and club territories are not shown to have injured or damaged Petitioner. P. 68 to 70.

2. The player regulations which are the only restraints which are alleged to have damaged Petitioner, (a) do not restrain commercial competition and agreements between employers as to the terms or conditions of employment of employees are not contrary to the common law or to the Anti-trust Statutes (P. 71 to 76); (b) do not directly, substantially, or at all, affect interstate commerce (P. 76 to 77); and (c) do not cause any injury to the public. P. 77 to 78.

IV. The complaint alleges a labor dispute which is exempted from the Anti-trust Laws by provisions of the Clayton and Norris-LaGuardia Acts. P. 79 to 83.

In referring to Petitioner's Brief we shall do so by the letters "Pet. B." followed by the number of the page or pages cited or referred to.

All emphasis throughout the argument is ours unless otherwise noted.

ARGUMENT.

I.

THE UNANIMOUS DECISION OF THIS COURT IN THE FEDERAL BASEBALL CASE WAS CORRECT AND IS APPLICABLE TO THIS CASE.

In *Federal Baseball Club v. National League* (1922), 259 U. S. 200, this Court, in a unanimous decision, squarely held that the business of exhibiting professional baseball games (1) is a local, not an interstate, business, and (2) is not trade or commerce within the meaning of the Sherman Act.

The plaintiff in that case had been a member of the Federal League of Professional Baseball Clubs which had attempted unsuccessfully to compete as a third major league with the American and National Leagues. When it ceased to function, plaintiff brought action against the two major leagues and constituent clubs, their respective presidents, and the old National Association, for treble damages upon the ground that the defendants, by combining to restrict and monopolize the supply of major league players in alleged violation of Sections 1 and 2 of the Sherman Act, had forced the plaintiff to cease operations with great loss. What we have denominated as player regulations were referred to in the decision as the "reserve clause". (269 Fed. 682.) Upon instructions that the defendants were engaged in interstate commerce, and had attempted to monopolize and had monopolized a part of that commerce, through the reserve clause, the jury returned a large verdict for the plaintiff upon which the court entered judgment. (269 Fed. 684.)

The plaintiff contended that the player regulations designated in the decision as the "reserve clause", which had been agreed upon and enforced by the defendants, constituted an unreasonable restraint of, or attempt to monopolize, interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act. The player regulations to which the defendants had agreed, provided (1) that the players' contracts in both the major and minor leagues shall be in one form, shall be assignable, shall contain a reserve clause or option in the employing club or its assignee to renew for the next season, and shall contain a covenant not to play for any club other than the employing club or its assignee [269 Fed. 683, 687; Rec. 87, 91-92, 96, 103, 108, 110, 112-113];* (2) that no club shall negotiate with a player under contract with, or on the reserve list of another club without the latter club's express consent [269 Fed. 683; Rec. 87]; (3) that a player who violates his reserve clause or contract shall be disciplined by being placed on the ineligible list which shall be kept by leagues and circulated among their member clubs [269 Fed. 687; Rec. 90-91, 99]; and (4) that a player on the ineligible list shall not play, be employed by a club in the major or minor leagues, or be released from his contract unless and until he shall have applied for, and shall have obtained, reinstatement. [269 Fed. 687; Rec. 91, 98-99.] Plainly, no distinction exists between the player regulations involved in the *Federal Baseball* case and those alleged in the case at bar.

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*In this analysis of the *Federal Baseball* case, citations reading "Rec....." refer to the Record in the *Federal Baseball* case which was filed and printed in this Court.

Indeed, the only significant distinction between the *Federal Baseball* case and the one at bar is that in the former case the plaintiff was a direct competitor of the defendants, whereas the Plaintiff-Petitioner in this case has never been in competition with the Defendants in any of their activities which he alleges violated the Federal Antitrust Statutes. This distinction between the instant case and the *Federal Baseball* case is especially pertinent to our third and fourth points.

In the *Federal Baseball* case, the plaintiff, to support its claim that the giving of, and playing in professional baseball games constituted interstate trade or commerce or, in the alternative, that the player regulations unreasonably restrained some line of interstate trade or commerce, relied upon the following facts: (1) Players and umpires traveled, and the clubs transported baseball equipment, from state to state; (2) the clubs purchased baseballs from national manufacturers and the American and National Leagues respectively received large sums from such manufacturers for the right to advertise their products as the "official baseball" of those respective leagues [269 Fed. 685; Rec. 265-269]; (3) the clubs played annual schedules of games and a World Series which required *systematic and continuous travel from state to state in order to reach the places where such games were played* (269 Fed. 683); and (4) the clubs of each major league, for a substantial sum, sold to Western Union the right concurrently to transmit throughout the country play-by-play descriptions of games from each park in the major leagues. [269 Fed. 683; Rec. 262, 263.] Plainly, no distinction exists between the facts relied upon in the *Federal Baseball* case to support a claim that professional baseball constitutes interstate commerce or that the player regula-

tions restrain interstate commerce and those alleged in the instant case to support a like claim, unless it can be said that the effect of the sale of rights to transmit interstate descriptions of games depends upon the character of the medium or facility which the purchaser of such rights utilizes for the transmission of such descriptions, that is, upon the fact that today some of the purchasers of such rights transmit some of such descriptions by radio and television instead of by the electric telegraph.

In reversing the judgment of the lower court in the *Federal Baseball* case, the Court of Appeals laid down the following propositions:

1. A game of baseball is inherently local from its beginning to its end. (269 Fed. 684-685.)
2. The travel of players and transportation of equipment in interstate commerce are not parts of the local game and do not convert that game into an interstate activity. (269 Fed. 684-685.)
3. Baseball games are a *sport and not trade;* and their inherent character *as a sport is not changed when they are given for profit.* (269 Fed. 685.)
4. The purpose and direct effect of the player regulations is to conserve the personnel of the clubs, to promote equality of competition, and to maintain public interest in the games; and their effect, if any, upon interstate commerce (*e.g.*, the travel of players and transportation of baseball equipment) was incidental and did not involve a violation of the Sherman Act. (269 Fed. 687-688.)

In holding that the giving of professional baseball exhibitions is a sport and not trade or commerce within the meaning of the Sherman Act, the Court of Appeals said:

". . . If a game of baseball, before a concourse of people who pay for the privilege of witnessing it, is trade or commerce, then the college teams who play football where an admission fee is charged engage in an act of trade or commerce. *But the act is not trade or commerce; it is sport.* The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the games. *They are still sport, not trade.*"

National League, etc. v. Federal Baseball Club (D. C. Cir. 1920), 269 Fed. 681, 685.

In holding that the player regulations, which apply to the giving of the baseball exhibitions, did not restrain or monopolize the interstate activities or commerce in which the clubs and their personnel also engaged, the Court of Appeals said:

"This brings us to consider whether or not the restrictions, which appellee says resulted in the monopolization denounced by the statute, affected illegally the interstate features of appellee's business, that is, the movement of its players and those of the other clubs of the Federal League and their paraphernalia from place to place in the league's circuit; for it is well settled that persons not engaged in interstate commerce may be guilty of violating the statute by illegally interfering with those who are so engaged. . . .

* * * * * * * *

" . . The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from

violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz., of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed *relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce.* Whatever effect, *if any,* they had, *was incidental, and therefore did not offend against the statute.*"

National League, etc. v. Federal Baseball Club (D. C. Cir. 1920), 269 Fed. 681, 686, 687-8.

In the unanimous opinion affirming the decision of the Court of Appeals, this Court, after stating that "the decision of the Court of Appeals went to the root of the case," said:

". . . Of course, the scheme requires *constantly repeated travelling on the part of the clubs,* which is provided for, controlled, and disciplined by the organizations, and this, it is said, means commerce among the states. But we are of opinion that the Court of Appeals was right.

"The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the leagues must induce free persons to cross state lines, and must arrange and pay for their doing

so, is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called *trade or commerce* in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. *That which in its consummation is not commerce, does not become commerce among the states because the transportation we have mentioned takes place.* To repeat the illustrations given by the court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state.

"If we are right the plaintiff's business is to be described in the same way, and the restrictions by contract that prevented the plaintiff from getting players to break their bargains, and the other conduct charged against the defendants, were not an interference with commerce among the states."

Federal Baseball Club v. National League, 259 U. S. 200, 208-209.

This decision, we submit, was clearly correct, has stood unquestioned by this Court for thirty years, and is manifestly applicable to the instant case. Indeed Petitioner virtually concedes that the decision is fatal to his asserted claim and contends that it is wrong and should be overruled (Pet. B. 19). In support of such contention that the *Federal Baseball* case should not be followed, Petitioner has advanced several arguments. All of the arguments, which are discussed separately below, are either unsound in law or without basis in fact.

(1) THE SOUTH-EASTERN UNDERWRITERS CASE, LORAIN JOURNAL CASE, AND THE MANDEVILLE FARMS CASE, DO NOT OVERRULE ANY OF THE UNDERLYING PRINCIPLES OF THE FEDERAL BASEBALL CASE AND ARE NOT INCONSISTENT WITH IT.

South-Eastern Underwriters Case.

Petitioner places his greatest reliance upon the *South-Eastern Underwriters* case, contending that the case overruled the principle of the *Federal Baseball* case and is entirely inconsistent with it and renders its rationale no longer applicable, at least to the extent of holding that organized baseball is not within the orbit of the Anti-trust Statutes. In a large measure he bases this conclusion upon the contention that the *Federal Baseball* case relied on the rationale of *Hooper v. California* (1895), 155 U. S. 648, and *Paul v. Virginia* (1868), 8 Wall. 168, and that the decision of this Court in the *South-Eastern Underwriters* case overruled the rationale of those decisions. The *Federal Baseball* case did not cite *Paul v. Virginia, supra.* Further, the *Federal Baseball* case did not cite the *Hooper* case, *supra,* in support of its decision that the exhibition of professional baseball games *is a sport and not trade or commerce* and *is purely local,* but instead, to support or illustrate the legal proposition that interstate activities which are incidental to engaging in a purely local activity do not convert the local activity into an interstate actvity.

That this Court did not intend, in the *South-Eastern Underwriters* case, to overrule the latter proposition is shown by its subsequent citation of the *Federal Baseball* case in *North American Company v. Securities & Exchange Commission* (1946), 327 U. S. 686, 694, to distinguish that proposition applied in the *Federal Baseball*

case from the case before the Court in which it held that the use of instrumentalities of interstate commerce had more than an incidental relationship to the business of a public utility enterprise. The proposition was not questioned in the *South-Eastern Underwriters* case; it was held inapplicable to the interstate insurance business.

While the *Hooper* and other cases had held that the states had power to regulate and tax certain activities of foreign insurance companies, the *South-Eastern Underwriters* case was the first instance in which the applicability of the Federal Anti-trust Statutes to the insurance business had been presented to this Court. (322 U. S. 533, 534.) On the other hand, the precise issue raised in the instant case was first presented to this Court in the *Federal Baseball* case and was decided squarely and unequivocally against Petitioner's contention.

In the *South-Eastern Underwriters* case, a large number of fire insurance companies were charged in an indictment with having violated Sections 1 and 2 of the Sherman Act, it being alleged that they had combined to monopolize in six states the sale of fire insurance policies for the purpose of controlling and raising the premium charge for such policies. It was not contended that the acts charged, if in, or substantially affecting, interstate commerce were not forbidden by the Sherman Act. The District Court, on the authority of *Paul v. Virginia, supra, Hooper v. California, supra, New York Life Insurance Company v. Deer Lodge County* (1913), 231 U. S. 495, and similar cases, dismissed the indictment on the ground that the issuance and delivery of a policy of fire insurance was not trade or commerce within the meaning of the Sherman Act.

In reversing the District Court, this Court pointed out that each and all of the cases upon which the District Court relied dealt with the power of the several states to tax or regulate foreign insurance companies doing business within, or delivering policies in, the taxing or regulating state and that the decisions were not conclusive of the question whether the interstate sale of insurance policies was subject to the Sherman Act, Justice Black, speaking for the majority, saying:

> ". . . Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate *insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.*"
>
> *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 534.

The Court reached the conclusion that "insurance transactions stretching across state lines" are interstate commerce within the meaning of the Sherman Act. Plainly fire insurance is a necessary and essential part of all modern business and of commercial transactions whether local or interstate, and all such transactions are affected by the price of the premiums (322 U. S. 533, 539-543).

As pointed out in the opinion, the insurance sold by the defendants covered various shipyards, warehouses, terminals, trucks, railroad equipment and rolling stock. Undoubtedly it also covered merchandise while in transit. Obviously, any combination which affected the price of such insurance would necessarily affect the price of all or most commodities that are sold interstate. The public

would be as injuriously affected by such a combination as it would by a conspiracy which would raise the price of gasoline, articles of food or clothing or any of the other necessities of life. Further, the majority opinion pointed out that for these reasons, twenty-three states of the Union had, prior to the Sherman Act, passed laws forbidding insurance combinations (322 U. S. 533, 555).

None of the foregoing elements are present in the instant case. The playing of baseball games contains no element either of trade or of commerce, or of commercial competition. Indeed, the conducting of sporting contests such as the exhibition of professional baseball is the very antithesis of trade and commerce.

Public interest demands that business be kept entirely competitive, without any control of one business organization over another. Otherwise, the economic life of the people would be strangled by a few large concerns obtaining dominion and control of all the vital industries and products and the prices of all living essentials.

On the other hand, the sport of baseball to be successfully conducted, must be organized and regulated.

It is to the advantage of any merchant or business concern not to have competitors in his or its trade or business, and the failure or bankruptcy of a merchant redounds to the advantage of competitors.

In professional baseball the exact converse is true. The finest baseball club in the world is valueless as either a sporting or financial proposition unless it has other clubs of approximately equal playing ability with which to compete. Two or three clubs are insufficient. The public would soon tire of seeing only two or three clubs playing each other and would cease patronizing their games.

Hence the necessity of at least six to eight clubs grouped together in a league, and those clubs must be as nearly equally balanced as possible. If the games or pennant race become too one-sided, public interest is lost.

Each club is almost as interested in the financial success of the others in the league as it is in its own success. For instance, it would be only a temporary advantage to Los Angeles and San Francisco if they operated in the black and all the other clubs in the Pacific Coast League operated in the red. The losers would soon cease to function. San Francisco and Los Angeles would have no one else with whom to play.

Another, and even more important, aspect of the baseball business which is peculiar to a sport based on team competition, is the necessity for regulating the sport in such a way as to insure honest and keen competition in the playing of the game and thus to maintain public confidence in the integrity of that competition. The player regulations, which are the basis of the Petitioner's claim here, are examples of the regulatory and disciplinary measures which are absolutely essential to assure the public of the players' will to win and loyalty to their respective teams. This feature of baseball differentiates it from every commercial enterprise furnishing goods and services, including entertainment services, and marks it as a business outside the commercial competition which the Sherman Act was designed to protect.

These factors show the absurdity of applying statutes drawn to regulate commercial enterprises to the conducting of competitive team athletic exhibitions such as professional baseball games.

Lorain Journal Case.

Petitioner argues that the rationale of the *Federal Baseball* case is inconsistent with the decision of this Court in the *Lorain Journal* case.

In the *Lorain Journal* case the trial court had expressly found that the defendant newspaper had formulated, and was pursuing a plan to utilize its monopoly of local advertising for the express purpose of destroying, and eliminating competition by, a new radio station, which was plainly engaged in interstate commerce. This Court said:

> "Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, *interstate and national*, as well as local."
>
> *Lorain Journal Co. v. United States*, 342 U. S. 150.

The Court found it unnecessary to pass upon the Government's suggestion that the interstate sale of defendant's newspaper, and the considerable interstate commerce engaged in by its publisher in the purchasing of its operating supplies, afforded a basis for classifying the publisher's entire operation as one in interstate commerce; nor did the Court pass upon the Government's contention that defendant's daily publication of local and interstate news and advertising was so inseparably integrated that any coercion used in securing local advertising inevitably operated to strengthen the defendant's monopoly of interstate news and national advertising. (342 U. S. 150.) In that connection this Court said:

> "It is not necessary, however, to rely on the above suggestions. The findings go further. They ex-

pressly and unequivocally state that the publisher's conduct was aimed at a larger target—the complete destruction and elimination of WEOL. The court found that the publisher, before 1948, enjoyed a substantial monopoly in Lorain of the mass dissemination not only of local news and advertising, but of news of out-of-state events transmitted to Lorain for immediate dissemination, and of advertising of out-of-state products for sale in Lorain. WEOL offered competition by radio in all these fields so that publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of *interstate* as well as local commerce."

Lorain Journal Co. v. United States, 342 U. S. 150-151.

In the *Lorain Journal* case this Court applied the long established principle, which was fully recognized and applied in the *Federal Baseball* case, that an unreasonable restraint or monopolization of *interstate commerce* does not escape the condemnation of the Sherman Act because the means utilized to effect the restraint or monpolization of interstate commerce are local restraints or monopolies.

The instant case involves only the giving, and the employment of Petitioner to play in, local professional baseball exhibitions. The complaint does not allege any facts which, if proved, would establish or support an inference that the player regulations were designed, intended or utilized by Defendants to restrain or monopolize any interstate activities, trade or commerce. The giving of local professional baseball exhibitions is not any part, and

much less an inseparable part, of the flow of any stream or line of interstate commerce. Indeed the case stated by Petitioner does not involve either commercial competition, commercial intercourse or commerce at all.

Mandeville Farms Case.

Petitioner three times cites and twice quotes from the *Mandeville Farms* case. It does not support him. In that case the defendants were manufacturers of sugar in California and combined among themselves to regulate the prices paid for sugar beets in the State of California. The action was for treble damages by the beet growers. The District Court dismissed the action, and the Appellate Court affirmed. The decision of both courts was upon the theory that by an amendment to the complaint, the plaintiff had specifically averred that the acts of the defendants had no effect upon interstate commerce. This Court construed the amendment to the complaint as containing no such averment, and so construing it, applied the long-settled principle that a restraint of the type forbidden by the Sherman Act, although arising in the course of intrastate or local activities, violates the act if such local restraint was intended to, or does, substantially restrain interstate commerce. Here, the player regulations upon which Petitioner solely predicates his alleged damages do not, and are not alleged to, restrain any interstate activity.

It will thus be noted that the three cases relied on to show that the rationale of the *Federal Baseball* case has been departed from by this Court are all cases dealing with commercial transactions: (1) An attempt to monopolize the interstate business of insurance for the purpose

of fixing premium rates; (2) an attempt to monopolize interstate advertising by destroying a competitor engaged in the interstate business of radio broadcasting; and (3) an intrastate agreement which was designed to and did substantially restrain interstate commerce in sugar.

(2) THE SUFFICIENCY OF THE COMPLAINT IS TO BE DETERMINED ON THE FACTS THEREIN ALLEGED. PETITIONER'S REFERENCES TO THE CELLER REPORT AND TO OTHER FACTS OUTSIDE THE RECORD ARE IMPROPER, BUT THEY DO NOT IN ANY EVENT SHOW THAT THE RESPONDENTS ARE WITHIN THE SHERMAN ACT OR THAT PETITIONER IS ENTITLED TO RECOVER IN A PRIVATE TREBLE DAMAGE ACTION.

The Petitioner filed in the District Court a complaint setting forth certain facts which he alleged entitled him to $375,000.00 treble damages. Thereafter he filed amendments to the complaint with the stipulation that the motions of the Defendants theretofore made to dismiss the complaint should stand to the complaint as amended. [R. 31-46].

The dismissal of the amended complaint by the District Court and the affirmance by the Ninth Circuit Court of Appeals were based upon the facts alleged in the complaint as amended. The correctness of those decisions of the courts below can, of course, be reviewed only within the framework of the facts alleged in the amended complaint. Nevertheless, Petitioner attempts throughout his brief to disregard that framework and to argue a case based on assertions wholly outside the record.

Petitioner makes no attempt to show that the facts alleged in his complaint state a claim which entitles him to recover treble damages. He does not argue that the player regulations by which alone he alleges he was injured had any effect, direct, substantial, or at all, upon interstate trade or commerce. On the other hand, he does not plead or argue that the rules and agreements as to territory or as to the sale of rights to broadcast and telecast games have injured him in any way. Instead he argues generally about interstate commerce and monopoly as though this were a suit by the government and as though all the material quoted from the Celler Report and other asserted facts concerning baseball had been alleged in his complaint. He argues that these facts thus quoted and asserted (but not pleaded) demonstrate that baseball generally is in interstate commerce. As our subsequent analysis of Petitioner's contentions will show, the excerpts from the Celler Report and the other unpleaded assertions of fact do not differ materially from the facts presented in the *Federal Baseball* case and do not demonstrate any essentially different relationship between baseball and interstate commerce. However, to the extent that facts outside the record are thus argued we wish to emphasize that those facts and the reasoning and conclusions argued therefrom were not presented to the lower courts whose decisions are here for review.

Apart from Petitioner's reliance upon alleged facts stated in the foregoing Report, Petitioner quotes therefrom the Delphic statement:

> "Pragmatically organized baseball is not amenable to effective State regulation."

In the pragmatic theory of philosophy, supposed principles or conclusions are formulated to conform to, and support, a practical result which the "philosopher" has previously concluded or assumed to be desirable; and except for the reference to this philosophy, the basis of the statement is wholly unexplained. The quoted statement does not enlighten one as to why baseball is not amenable to state regulation unless it is meant that one state cannot regulate the games played in another, that is to say, Wisconsin cannot prohibit the playing of baseball on Sunday in Illinois. We submit that such considerations do not tend to show that the playing of a professional baseball game or the business of producing professional baseball games in various cities is trade or commerce, or that a game played by the Los Angeles Baseball Club and Portland in the City of Los Angeles is other than a local affair subject to the regulatory powers of the State of California and the City of Los Angeles; conversely, when the clubs meet in Portland the regulations of California and Los Angeles are unavailing, and the game must be subject to the valid regulations of the City of Portland and the State of Oregon. A business man or corporation who conducts the same or similar business in a number of different states is subject to the local laws of each state and his business in one state cannot be regulated by the laws of another state in which he carries on the same business.

(3) THE FACTS ARGUED BY PETITIONER (NOT ALLEGED IN HIS COMPLAINT) THAT THE GIVING OF PROFESSIONAL BASEBALL EXHIBITIONS IN DIFFERENT CITIES NECESSITATES INTERSTATE COMMUNICATIONS DO NOT SHOW THAT THE COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION NOR DO THEY SHOW A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Aside from the fact that the situation which Petitioner pictures is not alleged in his complaint, (a) interstate communications are clearly incidental to the main object of giving of professional baseball exhibitions, and (b) Petitioner was in no way injured or damaged by the argued interstate activities. Further, it is obvious that the playing of a schedule of professional baseball games in different states of the Union required just as much interstate communication at the time of the *Federal Baseball* case as it does now.

(a) *Necessary Interstate Communications Do Not Make the Playing of Professional Baseball Games an Interstate Activity.* It seems to us the proposition is obvious. Otherwise, a local college or an amateur team which corresponded with another college or amateur team outside of the state with reference to the arranging of a baseball game would be engaged in interstate trade or commerce.

That would also be true of a business man who purchased property in another state or in several states if he corresponded about them or crossed state lines to inspect them, or of a lawyer who represented an out-of-state client in a litigation in a state court and who was compelled to communicate with his client or witnesses in another state.

In each of the above cases the interstate communications are, of course, subject to interstate regulations, but that would not make the main activity an interstate one nor change its essential character.

(b) *Petitioner Was in No Way Injured or Damaged by the Argued Interstate Activities of Respondents.* Again Petitioner seems to lose sight of the fact that in order for his complaint to have stated a claim within the jurisdiction of the Court, or one upon which relief could have been granted, he must show by his complaint some restraint on interstate commerce by which he was injured and which has a substantial effect on interstate commerce. Obviously, such interstate communications did not injure or damage Petitioner. His complaint specifically alleges that his only injury arose from enforcement of the player regulations.

(4) THE GIVING OF PROFESSIONAL BASEBALL GAMES ON A PREARRANGED SCHEDULE WHICH REQUIRES INTERSTATE TRAVEL OF THE PLAYERS IS NOT TRADE OR COMMERCE. SO HOLDING IS NOT DISSECTING RESPONDENTS' BUSINESS OR DISREGARDING THE INCIDENTAL INTERSTATE TRAVEL AND COMMUNICATIONS NECESSARY FOR THE PRODUCTION OF SUCH GAMES.

Petitioner urges here, as did the plaintiff in the *Federal Baseball* case, the fact that travel is a necessary and essential part of the giving of a baseball game. Exactly the same contention was advanced in the *Federal Baseball* case and was rejected by a unanimous decision of this Court:

> ". . . Of course the scheme requires *constantly repeated travelling on the part of the clubs,* which

is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States . . ."

Federal Baseball Club v. National League, 259 U. S. 200, 208.

Petitioner apparently does not contend that the actual playing of a baseball game (the main and only object of Respondents) is in itself an interstate transaction or embraces any element of commercial competition. Petitioner argues, however, that the rationale of the *Federal Baseball* case and Respondents' position rests upon artificially "dissecting" an integrated business or activity in a manner which is allegedly contrary to the rules stated in the *Mandeville Farms* case. (Pet. B. 30-2, 37-8.)

In that case this Court pointed out that its decisions subsequent to *United States v. E. C. Knight Co.* (1894), 156 U. S. 1 had established that the artificial and mechanical separation of "production" and "manufacturing" from "commerce" does not place an unreasonable restraint on interstate commerce beyond the scope of the Sherman Act if the restraint, monopolization or attempt to monopolize production or manufacturing is intended to, or does, substantially restrain interstate commerce. (334 U. S. 229-34).

This Court did not hold that the production of sugar beets, the sugar beets themselves, the local sale of sugar beets or even the refining of sugar from the sugar beets, constituted interstate commerce but instead that the restraints imposed upon these local activities were intended to restrain, and did restrain, interstate commerce in sugar. Plainly the *Mandeville Farms* case is not inconsistent with the *Federal Baseball* case or the case at bar. In the *Mande-*

ville Farms case, the end and objective of the defendants was the distribution and sale of sugar in interstate commerce. The defendants sought to avoid liability for their attempt to monopolize and control that commerce by pointing out that their illegal agreements dealt only with the price paid for beets before their manufacture into sugar. In the case at bar the end and object of the Respondents is the production of local baseball games. Of course interstate communication and travel are incidental to their production. The player regulations by which he alone alleges he was damaged were designed to affect and did affect only the playing of the local games. The Petitioner would concentrate attention upon these incidental activities which are in no way affected by the player regulations and by which Petitioner was in no way damaged and would ignore or disregard the main and sole objective of Respondents—a local activity to which alone the player regulations are designed to apply and do apply. But he alleges no acts of the Respondents designed to or which do affect such incidental interstate activities. The regulations were not designed to affect and did not have the slightest effect upon any of the incidental interstate activities of the Respondents or upon interstate communication and travel. To point this out is not to "dissect the baseball business" and is not contrary to the rationale of the *Mandeville Farms* case. *Indeed, the rationale of the Mandeville Farms case correctly understood entirely supports the position of the Respondents.*

Petitioner also argues that interstate travel is as essential to the giving of professional baseball exhibitions as is interstate transportation to the sugar industry and that travel is no more incidental to the baseball game than

it is to the business of distributing and selling sugar in interstate commerce. (Pet. B. 33). The fallacy is manifest. A baseball game does not travel in interstate commerce or at all, whereas sugar does move in interstate commerce and, in the *Mandeville Farms* case, it was the restraint of this interstate commerce in sugar which offended the Sherman Act.

Quoting from the *South-Eastern Underwriters* case, the statement that "No commercial enterprise of any kind which conducts its activities across State lines has been held to be *wholly* beyond the regulatory power of commerce under the Commerce Clause" (Pet. B. 32), Petitioner concludes that ". . . Baseball is within federal jurisdiction as opposed to the decision in the *Federal Baseball* case." Plainly, the conclusion is a *non sequitur* and inapposite. Laying to one side the fact that the giving of professional baseball exhibitions is not "a commercial enterprise," the question is not whether Congress has authority under the Commerce Clause to regulate the activities of those engaged in giving professional baseball exhibitions, but whether their activities in the aspect presented by the Petitioner fall within the scope of the Sherman Act. Nor does the statement that anyone engaged in an enterprise which in part includes activities across State lines is not wholly beyond the regulatory power of Congress, establish or imply that all of their activities, or specifically the giving of local professional baseball exhibitions, are subject to such regulation and much less have been subjected to such regulation by the Sherman Act.

(5) THERE IS NO ANALOGY BETWEEN THE INTERSTATE LEASE, SALE AND TRANSPORTATION OF MOTION PICTURE FILMS AND THE TRAVEL OF BASEBALL PLAYERS BETWEEN CITIES IN DIFFERENT STATES FOR THE PURPOSE OF HOLDING, IN THE SEVERAL STATES, EXHIBITIONS OF PROFESSIONAL BASEBALL.

On page 34 of his brief, Petitioner cites the decisions of *Binderup v. Pathe Exchange, Inc.* (1923), 263 U. S. 291; *Paramount Famous Lasky Corporation v. United States* (1930), 282 U. S. 30; *Bigelow v. RKO Radio Pictures* (1946), 327 U. S. 251, as holding that the motion picture industry is subject to the Anti-trust Statutes. What those cases hold is that the interstate sale and transportation of motion picture film constitutes interstate commerce.

Petitioner, in arguing that baseball is comparable to the moving picture industry, says that there can be no difference between the transportation of a motion picture film and the traveling of baseball players, that both the film and the players travel interstate for the purpose of producing a local exhibition, and that the fact that the ball game is not subject to being transferred (as pointed out by the Court of Appeals in the *Federal Baseball* case) is not significant because the local projection of the film in a theatre is likewise not transferable (Pet. B. 34-35).

It seems to us that the distinctions are obvious. The film is a commodity. The player is not, and his labor is expressly declared not to be a commodity or article of commerce. (15 U. S. C., §17.) As pointed out in the *Federal Baseball* case, the player is like a lawyer or a lecturer going into another state to argue or present a lecture. Neither, by reason of his travel, is engaged in interstate commerce.

The projection of a motion picture film, of course, is not interstate trade or commerce. *United States v. Crescent Amusement Co.* (1944), 323 U. S. 173, 183. But the fact that both the projection of the film and the exhibition of the game are entirely local does not help Petitioner's effort to place the baseball club in interstate commerce. The theatre owner has been held subject to the Sherman Act, not because he exhibits film, but because he had participated in agreements or combinations with others restraining interstate commerce in films.

In the motion picture cases cited by Petitioner the distributors were admittedly engaged in the business of selling and distributing motion picture films in interstate commerce. The question was whether or not their arrangement with the exhibitors effected a restraint of that interstate commerce. The distinction is clearly pointed out in the case of *Hart v. B. F. Keith Vaudeville Exchange* (2d Cir., 1926), 12 F. 2d 341, *cert. den.* (1926), 273 U. S. 704.

> "The case is distinguishable from Binderup v. Pathe Exchange, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308, where the manufacturers and distributors of motion picture films, in the regular course of their business, shipped them from one state to another, to be used by the consignee, ... *There the films were leased, transported, and delivered in interstate commerce, and to forbid the lessor to continue leasing them was a restriction of that commerce.*
>
> *"But the business of acting in a theater is purely a state affair.* The mere fact that the actors were obliged to cross state lines and have transportation paid, in some instances, does not change the character of the service, nor of the business. . . . *If the various acts of the defendants referred to have damaged the plaintiff in his business, or have interfered*

or restrained him in conducting his business, to his detriment and damage, it has been to his local business of booking contracts. It has not been an interference with interstate movement of stage properties or paraphernalia used in the vaudeville theatrical business . . ."

Hart v. B. F. Keith Vaudeville Exchange, 12 F. 2d 341, 344.

The *Hart* case was cited with approval in *Conley v. San Carlo Opera Co.* (2d Cir., 1947), 163 F. 2d 310.

Along with the motion picture cases, Petitioner cites *Ring v. Spina* (2d Cir., 1945), 148 F. 2d 647, wherein the Court of Appeals stated that it would seem invidious to regard the distribution of motion picture films as interstate commerce and to draw a different conclusion as to a stage production. *Ring v. Spina* was not based on the theory that the *Federal Baseball* case had been directly or impliedly overruled, or that it and *Hart v. B. F. Keith Vaudeville Exchange, supra*, were not to be followed. This is evident from the fact that the Court distinguished those cases from the one then before it. In the later case of *Conley v. San Carlo Opera Co., supra*, the sole issue presented to the Court was whether the appellant plaintiff, who was employed as a member of an opera company traveling to different cities in different states for operatic performances, was engaged in *inter* or *intrastate* commerce. The District Court, quoting at length from the *Federal Baseball* case, held that notwithstanding the travel of Conley and the Opera Company to cities in different

states, that his work was *intra* and not *interstate* commerce, saying in part:

> "In cases involving the performance of vaudeville acts the courts have held that contracts for the personal services of the entertainers were not the subject of commerce, even though the entertainers were required to go from state to state. Neugren v. Associated Chautauqua Co., 10 Cir., 1934, 70 F. 2d 605; Hart v. B. F. Keith Vaudeville Exchange, 2 Cir., 1926, 12 F. 2d 341, 47 A. L. R. 775 . . ."
>
> *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825, 831.

On appeal, the Second Circuit Court of Appeals in a *per curiam* decision affirmed the District Court, saying in part:

> "We have nothing to add to Judge Leibell's discussion of the question of jurisdiction. *He thought that decision was controlled by Federal Baseball Club v. National League*, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898, 26 A. L. R. 357, and Hart v. B. F. Keith Vaudeville Exchange, 2 Cir., 12 F. 2d 341, 67 A. L. R. 775, certiorari denied 273 U. S. 704, 47 S. Ct. 98, 71 L. Ed. 849. *We concur*. . . ."
>
> *Conley v. San Carlo Opera Co.*, 163 F. 2d 310, 311.

The above decision is in accord with those of all courts, state and federal, of which we are advised.

In *American League Baseball Club of New York, Inc. v. Pasquel* (Sup. Ct. 1946), 187 Misc. Rep. 230, 63 N. Y. S. 2d 537, in answer to the claim that organized baseball was a monopoly in violation of the national and state

laws and, therefore, the court could not enjoin the Mexican League from causing players to violate their contracts, the courts said:

> "Organized baseball has been in existence for many decades. The plaintiff's activities involve the rendition of services. Even if organized baseball, as claimed by defendants, be a monopoly, it would seem that it is not a combination in restraint *of trade, either under the provisions of section 340 of the General Business Law, known as the Donnelly Act, or at common law.* See *New York Clothing Manufacturers' Exchange, Inc. v. Textile Finishers Ass'n, Inc.*, 238 App. Div. 444, 265 N. Y. S. 105. In the case cited the court said (238 App. Div. p. 452, 265 N. Y. S. p. 114): 'Only the performance of services is involved. We think this agreement is valid as an agreement for the rendition of services, and that it *is in no sense in restraint of trade,* as used in the statutory enactments or at common law.'"
>
> *American League Baseball Club of New York, Inc. v. Pasquel*, 63 N. Y. S. 2d 537, 540.

See also: *Neugen v. Associated Chautauqua Co.* (10th Cir., 1934), 70 F. 2d 605; *Hart v. B. F. Keith Vaudeville Exchange* (2d Cir., 1926), 12 F. 2d 341, 344, *cert. den.* (1926), 273 U. S. 703; *People v. Klaw* (Gen. Sess. 1907), 55 Misc. Rep. 72, 106 N. Y. Supp. 341, 353; *People v. Newman* (Gen. Sess. 1919), 109 Misc. Rep. 622, 180 N. Y. Supp. 892, 902.

(6) THE FACT THAT THE PLAY-BY-PLAY ACCOUNTS OF SOME PROFESSIONAL BASEBALL GAMES ARE NOW REPORTED BY TELEVISION AND RADIO AS WELL AS BY TELEGRAPH IN NO WAY AFFECTS THE CHARACTER OF THE GAME OR CHANGES IT FROM A SPORT TO TRADE OR COMMERCE OR GIVES IT ANY ELEMENT OF COMMERCIAL COMPETITION OR MAKES IT AN INTERSTATE ACTIVITY.

Under Point V of his brief, pages 38 to 43, Petitioner contends that the interstate radio broadcasting and interstate televising of baseball games has made it an interstate activity.

There are two answers: (1) The sale by clubs of the rights to broadcast play-by-play accounts and to televise such plays does not change the local character of the ball game; and (2) such sale *would not change the games from a sport into trade or commerce.*

At the time of the *Federal Baseball* case, the opinion of the Court of Appeals shows that the defendants had a contract with a telegraph company for telegraphing accounts of the games, and we believe the Court will take judicial notice that long before that decision, accounts of the games in the major leagues had been telegraphed all over the United States.

Petitioner quotes a portion of the decision of Judge Frank in the case of *Gardella v. Chandler* (2d Cir., 1949), 172 F. 2d 402, 411, in which Judge Frank stated that although that fact appeared in the record it was not called to the attention of this Court. The brief of the

Federal Baseball Club shows that Judge Frank was in error and that the matter was argued in this Court.* That it was not commented on by this Court, in determining that the giving of professional baseball games was not interstate trade or commerce within the meaning of the Anti-trust Statutes, of course, does not indicate in any way that it was not considered by the Court.

The fact that since the *Federal Baseball* case there are different media for carrying the accounts of the games to the public cannot change those games from local affairs to interstate affairs. Otherwise, any local event that attracted the attention of the press or radio or television would become interstate.

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*Under a proposition that "the business of providing exhibitions of baseball games as conducted by defendants in error and plaintiffs in error is interstate commerce" the Federal Club in its brief in this Court (after arguing that the agreements among professional baseball clubs contemplated and required continuous and systematic interstate travel and transportation of equipment, constant interstate communication and utilization of the instrumentalities of interstate commerce) stated:

> "We have not, in the above discussion, made any reference to the various details of this business which reflects its inherently interstate character. It is common knowledge that baseball is the pre-eminent American sport. Millions of people follow the daily reports of the results of the games in the press, and in the large cities gather in the afternoon around the newspaper offices to see the bulletin reports of the scores. Not only so, but vast numbers of people travel from one city to another for the purpose of witnessing the games. Telegraph facilities are installed at all the ball parks in the major leagues, and in those of the more important minor leagues, where reports of the games are sent out and are received throughout the country. The Western Union Telegraph Company pays to the National League alone the sum of $18,000 annually for the exclusive privilege of having its wires on its grounds. Upon a scoreboard in each ball park the results of the games being played at the same time are indicated, so that the crowd assembled at each park is informed of the progress of the other games (Record p. 262)." (Federal Baseball Club Br. in this Court, 154.)

The essential difference between the status of an interstate reporter and the thing reported must never be lost sight of. The Western Union Telegraph Company, the daily newspapers with interstate circulation, which includes all metropolitan newspapers, and the radio and television networks are each and all engaged in interstate commerce. See *Fisher's Blend Station v. Tax Commission* (1936), 297 U. S. 650, 654-655.

The newspapers, radio and television networks are engaged in the keenest commercial competition with each other and with other units of their own media. Each and all of the reporting media are subject to all the federal interstate regulatory laws, including the Anti-trust Statutes.

For nearly a quarter of a century before the invention of radio and television the Los Angeles and San Francisco papers published detailed accounts of the Tournament of Roses Parade and of the Rose Bowl football game following the parade, and newspapers throughout the country published shorter accounts transmitted to them by telegraph. Could it be said for a moment that by reason of this reporting by the press of the Tournament of Roses Parade in Pasadena and the play-by-play account of the game that either the parade or the Rose Bowl game were changed from spectacles, designed for the edification of the members of the public viewing them, into interstate commerce transactions, *or were clothed with commercial competition*—a factor all courts have held necessary to support a treble damage action. Obviously not. *By what process of reasoning then can it be said that such effect would attach to these local events by their being reported by the now three existing reporting media?*

These events, *like baseball games*, were all carried on before the invention of either radio or television precisely as they are carried on today, *and they, as well as professional baseball games would be carried on tomorrow exactly as they are today if for some cause radio or television ceased to exist.*

The point which we are endeavoring to make is so clearly stated in *In re Herbert Bayard Swope* (1949), 24 LRRM 1065, that we cannot do better than quote it. In that proceeding, the jurisdiction of the State Board, over a dispute between employees and employers engaged in racing, was challenged on the ground that although racing had once been a local sporting event, interstate radio and television had changed it into an interstate one; hence, the State Board was without jurisdiction, the labor dispute being one within the jurisdiction of the National Labor Relations Board. In answer, the New York State Labor Relations Board said:

> "'Present day radio broadcasting and televising are something more than telegraphy, and we recognize that difference in degree may be tantamount to differences in kind. Both media, it is said, "bring the event into the home," but that is more figurative than accurate. Although broadcasting and televising give a more dramatic portrayal than does telegraphy, *the event itself does not thereby take place interstate. The race is still at its physical situs, even though electrical impulses convey sound and images to other points. We are not dealing here with regulation of such impulses.* . . . Thus, whatever the difference between telegraphy on the one hand, and broadcasting and televising on the other, none of these form any part of Respondents' activities *or alter the essential local character of the activity in*

which Respondents actually are engaged; namely, racing.'"

In re Herbert Bayard Swope, 24 LRRM 1065, 1066.

In the case of *Kowalski v. Chandler* (6th Cir., 1953), 202 F. 2d 413, where the same contention was made, the Sixth Circuit Court said:

". . . The facts with respect to the sale of broadcasting rights for radio and television in this case, which are herein emphasized by appellant as distinguishing this case from that cited above, are not different in any essential form from the sale of the rights of description of games over telegraph wires in the Federal Baseball Club case, and there appears no reasonable basis for distinguishing that case from the one before us."

Kowalski v. Chandler, 202 F. 2d 413, 414.

If the broadcasting and telecasting of descriptions of the games can be said to be interstate trade or commerce, it is a trade or commerce not carried on by the ball clubs but by the radio and television companies. Those companies *could not transfer to the game any element of trade or commerce.* It still remains a sport.

It is quite true that broadcasting and telecasting across state lines constitutes interstate commerce; and that under such conditions radio and television are instrumentalities of interstate commerce. However, at the time of the *Federal Baseball* decision it had, of course, long been established that the telegraph was likewise an instrumentality of interstate commerce. See *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877), 96 U. S. 1; *Leloup v. Port of Mobile* (1888), 127 U. S. 640;

Western Union Telegraph Co. v. Speight (1920), 254 U. S. 17.

Play-by-play accounts of professional baseball games were transmitted by telegraph at the time of the *Federal Baseball* decision. Although employing different means of interstate communication, there is manifestly no legal distinction between the transmission of descriptions of baseball games across state lines by radio or telecast and the transmission of such descriptions by telegraph or telephone. See *Fisher's Blend Station v. Tax Commission* (1936), 297 U. S. 650, 654, where this Court, in comparing communication by radio and by telegraph or telephone, said:

> ". . . In all essentials its procedure (radio broadcasting) does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce."
>
> *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 654.

At the time of the *Federal Baseball* case as shown by the portion of the Federal Baseball Club brief quoted heretofore in a footnote *ante* page 42, detailed accounts of baseball games were not only published in the papers throughout the United States but telegraph bulletins of them were displayed in various places. Long before television, pictures had been transmitted by telewire so that in the daily papers on the Pacific Coast were pictures of sporting and other events occurring in New York City the day before. In other words, on Tuesday morning in reading the account of a baseball game in New York or Chicago the day before, there often was a telegraphed picture of some play or plays. Could it be said that this

in any way changed the character of the reports or that these telegraphed pictures made the game an interstate commerce event?

(a) *The Opinions of Judges Hand and Frank in Gardella v. Chandler (2d Cir., 1949), 172 F. 2d 402 (Hereinafter Referred to as the Gardella Case) Were Erroneous and That of Judge Chase Correct.*

Petitioner quotes at length from the opinions of Judges Hand and Frank in the *Gardella* case. In that case, the plaintiff who had been placed on the ineligible list because of breaking his contract with the New York Giants, brought suit against that club, the National League, the Commissioner of Baseball, and others, for treble damages. The District Court, on the authority of the *Federal Baseball* case, dismissed the action. The Circuit Court of Appeals for the Second Circuit, by vote of two judges to one, remanded the case for trial upon the merits, each of the three judges rendering separate opinions, no one of which agreed with the other.

The first opinion, with the statement of facts, is the dissenting opinion of Judge Chase, who voted to affirm on the grounds: (1) That the *Gardella* case was not distinguishable from the *Federal Baseball* case which had never been overruled, was binding on all Federal Courts and was distinguishable from such cases as *South-Eastern Underwriters* case, and *Mandeville Farms* case; (2) that independent of the *Federal Baseball* case, the dismissal should be affirmed because the playing of professional baseball (a) is not trade or commerce, (b) is a local affair and not an interstate transaction, (c) does not involve any restraint upon commercial competition in the marketing of

goods and services, and (d) involves a player's services or ability to work which are not subjects of trade or commerce within the Anti-trust Statutes; and (3) that the complaint showed no causal connection between the broadcasting and telecasting of games and the damage to the plaintiff.

Judge Frank's views were entirely opposed to those of Judge Chase. The reasonableness of the player regulations was not and could not be in issue on defendants' motion to dismiss the complaint and, accordingly, had not been discussed either in oral argument or in the briefs. Nevertheless, Judge Frank based his opinion on an *ex parte* view that the players' regulations were so unfair to the players as to require the Court, if possible, to find some ground of reversal so that the wrongs which he conceived to be inflicted by those regulations could be remedied. Indeed, he frankly so stated, observing, "I think it should be so distinguished, if possible, . . ." After castigation of the player regulations which had not been argued to him he continued:

> "In what I have said about the nature of the contracts made with the players, I am not to be understood as implying that they violate the Thirteenth Amendment or the statutes enacted pursuant thereto. I mean simply to suggest that those contracts are so opposed to the public policy of the United States that, if possible, they should be deemed within the prohibitions of the Sherman Act 15 U.S.C.A. §§ 1-7, 15 note."

Gardella v. Chandler, 172 F. 2d 402, 409, 410.

Of course, the legality or illegality, reasonableness or unreasonableness, of the player regulations did not affect the question of whether the organization of professional baseball did or did not violate the Sherman Act.* See *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469-483-4; *Hunt v. Crumboch* (1945), 325 U. S. 821, 826. Nevertheless, with the preconceived idea that if possible some way should be found to avoid following the decision of the *Federal Baseball* case, Judge Frank concluded that the cases of *United States v. South-Eastern Underwriters Ass'n* (1944), 322 U. S. 533; *American Medical Association v. United States* (1943), 317 U. S. 519; *Binderup v. Pathe Exchange, Inc.* (1923), 263 U. S. 291; *Paramount Famous Lasky Corp. v. United States* (1930), 282 U. S. 30; and *Bigelow v. RKO Radio Pictures* (1946), 327 U. S. 251, impliedly overruled the *Federal Baseball* case and left it an "impotent zombi".

Other than *American Medical Association v. United Statcs* (1943), 317 U. S. 519, we have discussed all of the cases relied on by Judge Frank as impliedly overruling the *Federal Baseball* case and shown that their rationale is not opposed to that of the *Federal Baseball* case; that all of them are cases dealing with commercial competition of the keenest character and hence, are in no way applicable to the instant situation where the alleged combinations of the defendants are with reference to the production of base-

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*Since the Petitioner makes Judge Frank's castigation of the player regulations the basis of his argument under his sixth point that in any and all events this Court should, as a matter of policy, regardless of other questions, hold that organized baseball is violating the Sherman Act, we will reserve further discussion of those regulations for our answer to Petitioner's sixth point (*post* P. 54 to 58).

ball games in various cities. As stated by this Court in the *Apex Hosiery* case:

> "A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of the opinion that there was some form of restraint *upon commercial competition* in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like a present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but *in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. . . .*"
>
> *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495-497.

See, to the same effect: *Levering & Garrigeus Co. v. Morrin* (1933), 289 U. S. 103; *Schatte v. International Alliance, etc.* (9th Cir., 1950), 182 F. 2d 158, 167; *Conference of Studio Unions v. Loew's, Inc.* (9th Cir., 1951), 193 F. 2d 51, *cert. den.* (1952), 342 U. S. 919; *United States v. Gold* (2d Cir., 1940), 115 F. 2d 236.

Judge Frank relied upon the *American Medical Association* case (317 U. S. 519), for the proposition that the furnishing of medical services constituted "trade or commerce" within the meaning of the Sherman Act. However, that case did not so hold. Indeed, this Court in that case expressly excluded from consideration and decision the question whether a physician's practice of his profession constitutes trade or commerce (317 U. S. 528). It held that the business of obtaining medical

service and hospitalization on behalf of the members of the Group Health Association constituted trade or commerce in the District of Columbia under Section 3 of the Sherman Act, which is a far cry from repudiating the holding that employment services of baseball players are not trade or commerce within the meaning of Sections 1 and 2 of the Sherman Act.

Judge Hand did not entirely agree with either Judge Frank or Judge Chase, although Judge Hand held that the *Federal Baseball* case had not been directly or impliedly overruled. Judge Hand felt that possibly interstate broadcasting and telecasting might differentiate the *Gardella* case from the *Federal Baseball* case and give baseball an interstate character.

We submit that Judge Hand's opinion contains four basic errors which destroy any weight it might have in persuading this Court not to follow the *Federal Baseball* case.

(1) Judge Hand entirely overlooked the fact that the *Federal Baseball* case was decided on two separate grounds: (A) That baseball is not trade or commerce, and (B) that it is a local and not an interstate affair. Judge Hand disregards the first point and centers his attention on the question of whether the broadcasting and telecasting of descriptions of baseball games impress baseball with an interstate character. This disregards the fact that the game today and the rules and regulations that govern it are—as a comparison of the facts stated in the *Federal Baseball* case, in the *Gardella* case and as alleged in this case will show—virtually identical with the game as it existed at the time of the Federal Baseball decision.

(2) Judge Hand relied strongly upon a conception that the baseball clubs and those to whom they sold rights to broadcast and telecast games were engaged in a common venture—in other words, that a contract of sale makes the vendor and vendee joint venturers. Obviously, when the clubs sell broadcasting rights and do not participate themselves in the actual broadcasting or telecasting or in the receipts from that activity, there is not a common venture. The club participates in no way in the sharing of profits and losses from the broadcasting or telecasting of the games and is no more engaged in a common venture with the broadcaster than is a grocer with one of his customers. The venture—that is, the risk—is all on the broadcaster's side and is not shared in any sense by the baseball club.

(3) Judge Hand entirely overlooked the distinction between the character of the reporter and the character of the thing reported.

(4) Judge Hand relied strongly on a view that "the situation appears to me the same as that which would exist at a 'ball park' where a state line ran between the diamond and the grandstand," which situation he thought might impart an interstate character to the game (172 F. 2d 402, 407.) This is squarely in conflict with the holdings of this Court in *Hopkins v. United States* (1898), 171 U. S. 578, 603, and *Anderson v. United States* (1898), 171 U. S. 604, 612-613. In both of those cases it was held that sales made for commission or for personal profit in Kansas City of cattle in the stockyards were local sales and did not become impressed with an

interstate character because the Kansas-Missouri state line ran through the stockyards, and cattle so bought or sold might be moved across that line.

Petitioner concedes that this view of Judge Hand was based on an "unfortunate metaphor" (Pet. B. 42). Nevertheless, it was one of the grounds upon which Judge Hand based his decision. We submit it was no more erroneous than his conception that the baseball club which sold to broadcasting and television companies the right to broadcast and telecast descriptions of games at their own risk and expense was nevertheless engaged in a joint enterprise with its vendee or lessee. Nor is it any more erroneous than his assuming that the mere fact of telecasting and broadcasting descriptions of the game made it an interstate event, or that it changed the character of the game from a sporting event into one of trade or commerce.

Petitioner points out that according to the Celler Report the major leagues obtained 7.3% of their revenue from radio and television in 1939 and 10.5% in 1950. According to the Report, the major leagues are the only ones in organized baseball that profit from television and radio, the Report stating:

> ". . . receipts in the minor leagues from this source (radio and television) are negligible."
>
> Celler Report, p. 86.

However, the extent of the revenues derived from those sources by the major league clubs, or some of them, is immaterial. As repeatedly pointed out, at the time of the *Federal Baseball* case a substantial amount was paid for the privilege of reporting the games by telegraph.

The fact that some of the clubs in organized baseball sell the rights of television and radio broadcasting for increased compensation cannot change the principle that the sale of the reporting rights does not convert the games into an interstate commerce activity, much less does it change the essential character of the game.

(7) No Public Policy Requires This Court to Decline to Follow Its Decision in the Federal Baseball Case.

Under his sixth point Petitioner contends that regardless of other considerations the Court, *as a matter of public policy,* should hold organized baseball within the provisions of the Sherman Act. As we believe we shall demonstrate in the next point, his argument shows more clearly than anything we can say that the former decision of this Court that Congress did not intend the Sherman Act to cover organized sporting events such as the playing of professional baseball was correct.

Petitioner's public policy contention is based wholly upon Judge Frank's castigation in the *Gardella* case of the player regulations referred to in his opinion as the "reserve clause."

In the last analysis, this argument on public policy means that although in strict logic no facts are alleged to show that organized baseball offends the Sherman Act, this Court nevertheless should, on general principles, apply that statute notwithstanding its former decision that the Sherman Act was not intended to apply to professional sports of this character.

The reasonableness and validity of the reserve clause can not be presented or determined unless and until this Court has overruled its decision (1) that the producing of professional baseball games is *not* trade or commerce *within the meaning of the Sherman Act*, and (2) that the production of those games is *a local and not an interstate activity*.

Obviously, whether the player regulations are valid or invalid, reasonable or unreasonable, has no bearing at all upon whether the playing of baseball games or the production of those games is trade or commerce or whether the games as produced are interstate or local. The observations of this Court in *Hunt v. Crumboch* (1945), 325 U. S. 821, 826, are directly in point:

> "The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. *That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.* 'The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.' Apex Hosiery Co. v. Leader, 310 U. S. 469, 513, 84 L. ed. 1311, 1334, 60 S. Ct. 982, 128 A. L. R. 1044. *Whether the respondents' conduct amounts to an actionable wrong*

subjecting them to liability for damages under Pennsylvania law is not our concern."

Hunt v. Crumboch, 325 U. S. 821, 826.

To same effect see:

Apex Hosiery Co. v. Leader (1940), 310 U. S. 469, 483-484.

This would seem to dispose of the Petitioner's suggestion that as a matter of public policy (based on assumed unreasonableness of the player regulations) the activities alleged in the complaint should be held to be within the Sherman Act.

Indeed, the question of the reasonableness of the player regulations was not presented in the courts below, and manifestly that question can be finally judged or determined only upon evidence with respect to their history, purpose, and result. *Board of Trade v. United States* (1918), 246 U. S. 231, 238. However, although such question is clearly immaterial and irrelevant and is not an issue before this Court, we cannot allow the castigation of Judge Frank adopted by the Petitioner to pass unnoticed. The very nature of the services rendered by ballplayers and of the business of producing professional baseball games indicates the type of evidence that can be introduced at trial to support the reasonableness of the player regulations.

The reserve clause and player regulations cannot be considered apart from the unique nature of baseball as a sport based on team competition. As a game, baseball

must have rules as to how it shall be played and who shall play it. The reserve clause is one of the rules dealing with the eligibility of players. The public interest and patronage, upon which professional baseball depends, demands (1) the unquestionable integrity and honesty of the game and its participants, and (2) a good contest on the field and good competition among the clubs in a league.

The public demands that each baseball player have full loyalty to, and extend his best efforts for, his club. This problem of player loyalty is peculiar to sports based on team competition. Obviously public confidence in player loyalty and will to win can not be maintained if the player, while playing for one club, may seek a job with another or may be pressed with offers from several other clubs against which he is playing. The mere possibility of these divided loyalties would destroy public confidence and team morale.

To excite public interest the baseball game must be a reasonably equal contest and uncertain as to result. This competition on the field can not be maintained if a club is free to induce a Ted Williams, a Stan Musial, and a Roy Campanella to change clubs and thus to build up an overwhelming player superiority.

If at the end of any playing season the players of each club were free to negotiate with any other club in the same or another league, it takes little imagination to foresee that a few of the wealthier clubs would absorb all the star talent, thus unbalancing the playing talent of their own and all other leagues. This would ultimately

be as much to the detriment of the players and the public as to the club owners. No club in any league could be certain that in the ensuing season it would have a balanced club. One club might lose all of its pitching talent, another all of its fielding talent.

These considerations were specifically recognized by the Court of Appeals in the *Federal Baseball* case:

> ". . . If the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain."
>
> *National League v. Federal Baseball Club*, 269 Fed. 681, 687.

These aspects and other phases of the history, purpose and effect of the reserve clause and related regulations of baseball were not before Judge Frank in the *Gardella* case and consequently, his characterization of the reserve clause must be judged in the light of his obviously meager background on the subject. We repeat, however, that the reasonableness of the player regulations is not an issue now before this Court.

II.

THE CONSTRUCTION OF THE SHERMAN ACT BY THIS COURT IN THE FEDERAL BASEBALL CASE SHOULD NOT NOW BE DEPARTED FROM, SINCE IT HAS STOOD UNIMPAIRED BY COURT DECISION OR CONGRESSIONAL ACTION FOR MORE THAN THIRTY YEARS, DURING WHICH PERSONS ENGAGED IN PROFESSIONAL BASEBALL HAVE ACTED, AND ARE ACTING, IN RELIANCE UPON IT.

We submit that in no event should this Court at this late date depart from or overrule the *Federal Baseball* case.

Directly in point are the observations of this Court in the case of *Walling v. Halliburton Oil Well Cementing Co.* (1947), 331 U. S. 17, where, speaking through the Chief Justice, the majority of this Court, after holding the opinion in the so-called *Belo* case was correct, said:

> ". . . Moreover, our holding in *Belo* has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. *Knowing of the Belo decision, the Congress has permitted Sec. 7 (a) to stand unmodified and the courts have applied it as so construed.* Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. *Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time.*"

Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17, 25, 26.

In *United States of America v. Title Insurance and Trust Company* (1924), 265 U. S. 472, this Court said:

> ". . . Legislatures may alter or change their laws without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. *Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.*"
>
> *United States of America v. Title Insurance and Trust Company*, 265 U. S. 472, 486-7.

While that decision dealt with the construction of a statute with reference to land titles we think its principle is equally applicable to a decision of this Court on which the business world has relied. See *National Bank v. Whitney* (1880), 103 U. S. 99, 102; *Helvering v. Griffiths* (1943), 318 U. S. 371, 402.

If persons desiring to engage in the production of professional baseball games had consulted the decisions of this Court as to the scope and extent of the Sherman Act, they would have been advised that this Court after due consideration had unanimously held that the production of such games was not trade or commerce *within the meaning of those words as employed in the Anti-trust Statutes*, and was essentially a local and not an interstate activity. That decision, of course, should be sufficient and conclusive for the average layman or lawyer, since the authority of final construction not only of the Constitution but of the Federal Statutes is placed in this tribunal.

However, had persons desiring to produce professional baseball games gone farther and examined the opinions of the subordinate federal court and of the state courts, they would have been apprised that the decision in the *Federal Baseball* case has been uniformly followed not only by the courts, but by state and federal administrative agencies. See the list of federal cases in which the *Federal Baseball Club* case has been cited with approval, set forth in the opinion of the District Court below. [R. 43-44; 101 F. Supp. 93, 94.] See also *In the Matter of Los Angeles Turf Club, Inc.* (1950), 90 N. L. R. B. 20; *In Matter of Olympia Stadium Corporation* (1949), 85 N. L. R. B. 389; *In re Herbert Bayard Swope* (1949), 24 L. R. R. M. 1065.

Notwithstanding the fact that, as we have shown, the decision of this Court in the *Federal Baseball* case for more than thirty years has been followed by state and federal courts and by state and national administrative agencies and when cited to this Court has not been questioned, Petitioner asks this Court to declare that today that decision's interpretation of the Sherman Act is not the law. *We submit that such a change is the function of Congress.*

Petitioner opens his brief with quotations from recent decisions of this Court to the effect that Congress in enacting the Sherman Act exercised the full power given to it under the Constitution, the implication being that if the playing of professional baseball is not trade or commerce within the meaning of the Sherman Act, it cannot be such within the meaning of the Constitution, hence the Sherman Act either applies to organized baseball or Congress is powerless to regulate it.

Petitioner's position is unsound. While it is true that this Court has said in several cases that Congress exercised its full constitutional power in the enactment of the Sherman Act, we believe the decisions make it clear that the full exercise of that power was limited to preventing restraints on commercial competition in interstate trade or commerce.

Apex Hosiery Co. v. Leader (1940), 310 U. S. 469, 495;

United States v. Frankfort Distilleries (1945), 324 U. S. 293, 297-8.

In *Apex Hosiery Co. v. Leader, supra,* this Court held that although Congress had the power to bring such acts of a labor union as were there involved under the Sherman Act, it had not done so, the Court pointing out that the acts of the defendants did not involve any commercial competition which had always been held an essential element of a violation of the Sherman Act, and that it was only *in the sense of preventing* restraints on commercial competition that Congress had exercised its full constitutional authority, saying in part:

> "Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction, not constitutional power. The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicity recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."
>
> * * * * * * * *
>
> ". . . The end sought was the prevention of restraints to free competition in *business and commer-*

cial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

* * * * * * * *

". . . Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. *It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.'* Atlantic Cleaners & Dyers v. United States, *supra* (286 U. S. 435)."

Apex Hosiery Co. v. Leader, 310 U. S. 469, 488, 493, 495.

Plainly the question of whether the alleged activities of Respondents are within the orbit of the Sherman Act is also a matter of statutory construction and not of constitutional power. It may be assumed that Congress has the power to regulate a business utilizing interstate commerce and transportation even though it does not involve restraints upon commercial competition, if and when Congress decides such regulation is necessary. The error of the Petitioner is in assuming that because it has such power it exercised it in the Sherman Act with respect to the Respondents' activities alleged in this case.

When the *South-Eastern Underwriters* case came before this Court, no decision involving the application of the Sherman Act or any other federal statute to the insurance business had theretofore come before this Court. This Court, in numerous decisions dealing with the power

of states to regulate and tax the insurance business in a situation where Congress had not acted in the field, had upheld the power of the states upon the ground, among others, that insurance, at least in the aspects presented in those cases, did not constitute interstate commerce. Nevertheless, in the *South-Eastern Underwriters* case, three of the seven sitting justices believed that, in view of the Court's prior decisions on different questions which had, however, led to the development of extensive state legislation and business practices, the Court ought not to hold the insurance business subject to the Sherman Act but that the Court, instead, should leave that question to the determination of the Congress which could deal with it in such a way as to guard against possibly disastrous consequences of a contrary decision by this Court. However, the majority of the sitting justices, believing that the Congress had intended to subject the insurance business to the Sherman Act, held that the prior decisions of this Court upon entirely different questions did not justify the application of the doctrine of *stare decisis*. Manifestly, where, as here, the precise question was unanimously decided by this Court more than thirty years ago and all of the business interests and practices of those engaged in giving professional baseball exhibitions have been carried on in reliance upon that decision, the remedy, if it be needed, should be left to and formulated by Congress.

No one, so far as we are advised, including the Celler Committee, believes that the Anti-trust Statutes as now drawn can be applied to all activities of organized baseball without destroying it.

Petitioner, on page 44 of his brief says:

"(a) Unique Position of Baseball Does Not Justify Judicial Legislation.

"(a) It is argued that baseball requires special consideration under the Anti-trust Laws, because such a team sport cannot exist in completely free economic competition.

That may be true but it is no argument whatsoever that baseball is not within the federal jurisdiction."

Petitioner's argument demonstrates the correctness of the decision in the *Federal Baseball* case. In our first point we showed the impracticability of attempting to apply a statute drawn to regulate commercial enterprises to the conducting of athletic exhibitions such as professional baseball games. If, as Petitioner apparently concedes, *"such a team sport cannot exist in completely free economic competition"* it would seem clear that, as construed by this Court in the *Federal Baseball* case, the Sherman Act was not intended to cover the giving of athletic sporting events such as professional baseball games.

Petitioner argues that to uphold the *Federal Baseball* case because of the unique character of baseball or for other reasons, would be to declare that none of the activities of organized baseball is subject to federal jurisdiction and to grant baseball *carte blanche* immunity from the Sherman Act and from federal regulation by appropriate legislation. We do not for a moment contend that none of the activities of organized baseball or these Respondents is subject to federal regulation or that organized baseball and these Respondents could not engage in activities which would constitute a violation of the Sherman Act. What we do contend is that none of the activities, by which plaintiff was allegedly damaged and

which alone are before this Court for consideration, either violates or comes within the scope of the Sherman Act.

The *Federal Baseball* case was decided not upon the ground that Congress did not have the authority to regulate baseball, but upon the principle that the playing of professional baseball was not trade or commerce within the meaning of those terms as employed in the Sherman Act.

If the Court now overrules the *Federal Baseball* case, it cannot decree any modification of, or a partial application of, the existing Anti-trust Statutes, but must enforce them in their entirety even though that enforcement destroys the organization of professional baseball to the detriment of the players, the persons producing the games, and to the public.

Congress, on the other hand, can, if it believes public interests require it, enact such regulatory measures as it believes necessary for the preservation of the game and the protection of the public interest. Further, such statutes will operate in the future, not retrospectively, and would impose civil and criminal liabilities only against those who disregard their mandate *after their enactment*.

It would probably be an overstatement to assert that if the *Federal Baseball* case were reversed there would be no more professional baseball. But certainly the present organization which has brought the sport to its present great popularity could not continue. The uncertainty which undoubtedly would prevail, before any remedial legislation could be enacted, as to the extent of the control baseball clubs and leagues could exercise over their players to insure the integrity of the game and adequate talent to each club in a league so as to keep the teams evenly balanced would undoubtedly result in the wrecking

of the present organization of the game. This obviously would not be of any benefit to the players or the public.

We submit that the views of the District Court on this phase of the case are most appropriate.

> "We are supposed to be living in a land of laws. Stability in law requires respect for the decisions of controlling courts or face chaos."
>
> * * * * * * * * *
>
> *"Undoubtedly large investments have been made on the strength of Mr. Justice Holmes' opinion in the Federal Baseball Club case, supra,* and now a slight shadow has been placed upon the status of such clubs by the Gardella case, *supra,* by the opinion of Judge Frank wherein he assumes the role of crystal gazer in attempting to determine in advance that the Supreme Court is going to in effect reverse the Federal Baseball Club case.
>
> "It is a matter of common knowledge that the status of organized baseball is the subject of a congressional hearing and it may pass legislation that will be determinative of the issue before this court. I believe it is my clear duty to endeavor to be a judge *and should not assume the function of a pseudo legislator. It must be remembered that judicial decisions operate retroactively."*
>
> *Toolson v. N. Y. Yankees,* 101 F. Supp. 93, 95, R. 45-6.

We submit that (1) the *Federal Baseball* case is correctly decided and is applicable here, and (2) in any and all events any change in the law as established by this Court's construction of the Sherman Act should now be left to Congress to which authority to make changes in the existing law is delegated by the Constitution.

III.

THE COMPLAINT DOES NOT STATE A CLAIM UNDER THE ANTI-TRUST STATUTES, EVEN IF THE COURT HAS JURISDICTION OF THE SUBJECT MATTER.

It is the purpose of this and the succeeding point to show that even if it should be held that the District Court had jurisdiction over the subject matter of this action, the Petitioner nevertheless fails to state a claim under Section 4 of the Clayton Act because (1) the restrictions which he alleges upon league territorial rights and upon interstate radio and television broadcasting are not shown to have damaged him in any way; (2) the player regulations, which are the only restraints which are alleged to have damaged Petitioner, (a) do not restrain commercial competition inasmuch as agreements between employers as to the terms or conditions of employment of employees are not contrary to the common law or to the Anti-trust Statutes; (b) do not directly, substantially, or at all, affect interstate commerce; and (c) do not cause any injury to the public.

(1) The Alleged Restraints Concerning Radio and Television and Concerning League and Club Territories Are Not Shown to Have Injured or Damaged Petitioner.

In a treble damage action under Section 4 of the Clayton Act we believe it is fundamental that a plaintiff must show, among other things, that a violation of the Anti-trust Statutes damaged him in his person or property.

As heretofore noted, Petitioner was not a competitor of any of the Respondents, but an employee of one of the named Defendants not served with process.

In his second and third causes of action Petitioner alleges that the various leagues had agreements to respect each other's territory, and certain agreements among the Defendants limiting the right of clubs to sell radio and television rights.

There is no issue in this case as to whether the alleged agreements and rules limiting the sale of rights to broadcast or telecast descriptions of games or the alleged agreements respecting club territory violate the Anti-trust Laws. No allegation is made that such agreements and rules injured the Petitioner in any way and consequently, the validity of such agreements or rules is not relevant to the Petitoner's claim and is not open for decision in this case.

In the District Court Petitioner placed great reliance upon these averments, and some—but much less—upon them in the Court of Appeals. In this Court he apparently has abandoned them. This is doubtless due to the fact that he has come to realize that there is no averment that he himself was in the business of producing baseball games or engaged, or desired to engage, in radio or television broadcasting, and there is no allegation showing any injury to his person or his property by reason of the alleged restraints set forth in his second and third causes of action. Since the Petitioner makes no reference to those counts, we point out (1) that he seems to have abandoned

his second and third alleged claims and (2) that in any event there is no averment in them showing any possible injury or damage to Petitioner's person or property.

> "In the absence of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-trust Act. For these reasons, the complaint does not state a cause of action within the jurisdiction of the federal court. The general demurrer should have been sustained."
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. 2d 742, 754.

See to the same effect and announcing the same rule: *Noyes v. Parsons* (9th Cir. 1917), 245 Fed. 689, 695-697; *Beegle v. Thomson* (7th Cir. 1943), 138 F. 2d 875, 881, and cases cited; *Glenn Coal Co. v. Dickinson Fuel Co.* (4th Cir. 1934), 72 F. 2d 885, 887; *Jack v. Armour & Co.* (8th Cir. 1923), 291 Fed. 741, 744; *A. J. Goodman & Son v. United Lacquer Mfg. Corp.* (D. Mass. 1949), 81 F. Supp. 890, 893; *Westmoreland Asbestos Co. v. Johns-Manville Corp.* (S. D. N. Y. 1939), 30 F. Supp. 389, 391; *United States v. San Francisco Electrical Cont. Ass'n* (N. D. Cal. 1944), 57 F. Supp. 57; *Gerli v. Silk Ass'n of America* (S. D. N. Y. 1929), 36 F. 2d 959, 960; *Myers v. Shell Oil Co.* (S. D. Cal. 1951), 96 F. Supp. 670, 674-675.

(2) THE PLAYER REGULATIONS, WHICH ARE THE ONLY RESTRAINTS WHICH ARE ALLEGED TO HAVE DAMAGED PETITIONER, (a) DO NOT RESTRAIN COMMERCIAL COMPETITION, AND AGREEMENTS BETWEEN EMPLOYERS AS TO THE TERMS OR CONDITIONS OF EMPLOYMENT OF EMPLOYEES ARE NOT CONTRARY TO THE COMMON LAW OR TO THE ANTI-TRUST STATUTES, (b) DO NOT DIRECTLY, SUBSTANTIALLY, OR AT ALL, AFFECT INTERSTATE COMMERCE, AND (c) DO NOT CAUSE ANY INJURY TO THE PUBLIC.

(a) *The Player Regulations Do Not Restrain Commercial Competition. Agreements Between Employers as to the Terms or Conditions of Employment of Employees Are Not Contrary to the Common Law or to the Anti-trust Statutes.*

The refusal of the Defendants to employ Petitioner embraced no semblance of commercial competition. Even if it could be held—contrary to reason and authority—that giving exhibitions of baseball constitutes commercial competition between the various clubs and leagues, the non-employment of Petitioner did not affect that competition.

As shown by the quotation from the decision in the *Apex Hosiery* case, *ante*, p. 50, this Court has consistently refused to apply the Sherman Act to cases, including even cases where through a strike interstate shipment of goods in substantial amounts was prevented by illegal means,

> *". . . in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. . . ."*
>
> *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 497.

The courts have consistently recognized the distinction between competition for labor and commercial competition. (*Schatte v. International Alliance, et al.* (9th Cir. 1950), 182 F. 2d 158, 167, *cert. den.* (1950) 340 U. S. 827; *Conference of Studio Unions v. Loew's, Inc.* (9th Cir. 1951), 193 F. 2d 51, *cert. den.* (1952), 342 U. S. 919; *Industrial Assn. v. United States* (1925), 268 U. S. 64; *Levering & Garrigues Co. v. Morrin* (1933), 289 U. S. 103.

In *United States v. Gold* (2nd Cir., 1940), 115 F. 2d 236, the Court distinguished between (1) the service of the employees to the dressing and dyeing companies and (2) the service of the dressing and dyeing companies to the manufacturers of fur garments. Defendant's acts affected only the former. Therefore, it was held that defendant had restrained only competition for labor and had not violated the Sherman Act. Concerning restraints on competition for labor, the Court, speaking through Judge Learned Hand, declared:

> ". . . There can be no question that the accused intended to acquire a monopoly of the whole supply of the services rendered by the employees; . . . *But the court in the Apex case expressly declared that the Sherman Act did not cover any restraint of competition in such services.* . . ."

United States v. Gold, 115 F. 2d 236, 238.

In *Conference of Studio Unions v. Loew's, Inc.* (9th Cir. 1951), 193 F. 2d 51, *cert. den.* (1952), 342 U. S. 919, the appellant plaintiffs were the Conference of Studio Unions and some of the individual members of the unions. The defendants were large motion picture companies generally known as the Majors, and The International Asso-

ciation of Theatrical Stage Employees and Moving Picture Operators Local 44, hereinafter referred to as IATSE. It was alleged that the Majors and the IATSE entered into an agreement whereby the Majors agreed to employ only members of the IATSE, and that the latter had agreed to furnish to the Majors their most skilled members; that the labor turnover as a result of such conspiracy was expected to result in a scarcity of new motion pictures, and that the Majors had agreed to curtail production and distribution of their pictures and refrain from releasing motion pictures previously produced but not released; and to execute an exhibitor's agreement requiring the exhibitors to run motion pictures for a longer period of time than had been the custom, all for the purpose of driving the independents out of business. It was further alleged that in pursuance of the unlawful conspiracy to destroy the minor producers, some of the individual plaintiffs, members of the unions comprising plaintiff conferences, had been discharged by the defendant producers. The District Court entered judgment on the pleadings in favor of the defendants upon the grounds:

> ". . . that even though a conspiracy in restraint of trade is alleged, the damages sustained by appellants did not result from any restraint of *commercial competition*; and, that the acts which are alleged to have injured appellants are unfair labor practices, and, therefore, the National Labor Relations Board has exclusive jurisdiction of the case."

The Court of Appeals for the Ninth Circuit affirmed the judgment, saying in part:

> ". . . They (appellants) *are not in the business of producing motion pictures; they do not exhibit motion pictures; they neither compete with the*

Majors nor purchase from them. In fact, they are not employees of the companies whom it is alleged the appellees intend to destroy. The damage alleged to have been suffered by appellants does not flow from any injury to the competitive situation of the motion picture industry, that is, their injury has not arisen from the acts allegedly perpetrated against the Independents."

* * * * * * * *

". . . A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the Anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed *which harms him.* He must show that he is *within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.* Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.

"Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition *and withheld from those who seek the windfall of treble damages because of incidental harm.*"

Conference of Studio Unions v. Loew's Inc., 193 F. 2d 51, 53, 54-55.

What the Petitioner is really complaining about here is the adoption by the baseball clubs—as an association of employers—of rules and regulations for the employment

of baseball players by the members of that association. Such agreements by employers regulating competition for employment services are clearly within the principle applied to unions in the *Apex Hosiery* case. This principle has been frequently applied in the federal and state courts. *Industrial Assn. v. United States* (1925), 268 U. S. 64; *United States v. Gold* (2d Cir. 1940), 115 F. 2d 236, 238; *Hunt v. Riverside Co-operative Club* (1905), 140 Mich. 538, 104 N. W. 40 (association of plumbers fixed wages of labor); *State v. Employers of Labor* (1918), 102 Neb. 768, 169 N. W. 717 (association of all employers in Omaha combined to force open shop); *Trade Press Pub. Co. v. Milwaukee Typographical Union* (1923), 180 Wis. 449, 193 N. W. 507 (all Milwaukee newspaper publishers agreed to force open shop); *American Cloak & Suit Mfrs. Ass'n v. Brooklyn Ladies' Garment Mfrs. Ass'n* (1931), 143 Misc. Rep. 319, 255 N. Y. Supp. 614 (employers' association to create and enforce labor standards); *Associated Hat Mfrs. v. Baird-Unteidt Co.* (1914), 88 Conn. 332, 91 Atl. 373 (holding manufacturers' association which forced open shop did not violate Sherman Act or common law); *Androff v. Building Trades Employers' Ass'n* (1925), 83 Ind. App. 294, 148 N. E. 203 (association limiting employees' pay); *Williams v. Quill* (1938), 277 N. Y. 1, 12 N. E. 2d 547 (transit employers agreed to force closed shop); *Atkins v. Fletcher Co.* (1904), 65 N. J. Eq. 658, 55 Atl. 1074 (association intimidating and excluding certain workers); *City Trust, S. D. & S. Co. v. Waldhauer* (1905), 47 Misc. Rep. 7, 13, 95 N. Y. Supp. 222, 225; *Forstmann & Huffman Co. v. United Front C. of T. Workers* (1926), 99 N. J. Eq. 230, 237, 133 Atl. 202, 204, 205; *Goldfield Consol. Mines Co. v. Goldfield M. U. No. 220* (C.C. Nev. 1908), 159 Fed.

500, 517, 518 (members of association combined to reduce wages); *Beck v. Railway Teamsters' Protective Union* (1898), 118 Mich. 497, 517, 77 N. W. 13, 21.

The foregoing cases all deal with competing commercial enterprises. With how much greater force is their principle applicable to employers engaged practically as partners in producing exhibitions of professional baseball games.

(b) *The Player Regulations Do Not Directly, Substantially, or at All, Affect Interstate Commerce.*

There is not and truthfully could be no allegation that the ineligibility of the Petitioner reduced the number of players employed by any club or the number of players who travel from state to state, or the quantity of baseball equipment which is transported in intra or interstate commerce. It is not alleged, and it could not truthfully be averred, that the ineligibility of the Petitioner or the player regulations generally affect in any way the broadcasting and telecasting of descriptions of baseball games. Obviously, if Petitioner is unable to play, some other person will play and travel in his place, and his presence or absence in any game would not affect the broadcasting or telecasting of such descriptions.

As before noted, Petitioner argues that there must necessarily be a large amount of interstate communication in the arrangement of schedules, traveling of players, etc. As pointed out, no such interstate activities are referred to in his amended complaint. But it is equally obvious that the employment or non-employment of Petitioner would have no direct or substantial effect upon such interstate communications. It would take just as much cor-

respondence to arrange a schedule of games whether Petitioner was or was not a player for any of the Respondents.

Of course, it is well established that in order to furnish a basis for an action under the Sherman Act, any restraint of interstate trade or commerce must be a substantial restraint. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U. S. 219, 234; *United Mine Workers of America v. Coronado Coal Co.* (1922), 259 U. S. 344, 410-411, 412; *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.* (1924), 265 U. S. 457; *Levering & Garrigues Co. v. Morrin* (1933), 289 U. S. 103; *Chicago Board of Trade v. United States* (1918), 246 U. S. 231, 238; *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469.

(c) *The Player Regulations Do Not Cause Any Injury to the Public.*

The private statutory right of action to recover treble damages caused by a violation of the Sherman Act was created to induce private persons to aid in the enforcement of that Act. However, the private right of action is incidental and subordinate to the protection of the public. *Appalachian Coals, Inc. v. United States* (1933), 288 U. S. 344, 360; *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 500; *Shotkin v. General Electric Co.* (10th Cir., 1948), 171 F. 2d 236, 239; *Feddersen Motors v. Ward* (10th Cir., 1950), 180 F. 2d 510, 521-522; *Glenn Coal Co. v. Dickinson Fuel Co.* (4th Cir., 1934), 72 F. 2d 885, 889; *Abouaf v. J. D. & A. B. Spreckels Co.* (N. D. Cal., 1939), 26 F. Supp. 830, 832-833; *Myers v. Shell Oil Co.* (S. D. Cal., 1951), 96 F. Supp. 670, 674; *Citizen Publishing Co. v. Merchants & Mfr. Ass'n* (D. D. C., 1949), 83 F. Supp. 994, 997.

In *Shotkin v. General Electric Co., supra,* the principle is thus stated:

> ". . . Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. *There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination,* or concert . . ."
>
> *Shotkin v. General Electric Co.,* 171 F. 2d 236, 239.

In *Apex Hosiery Company v. Leader, supra,* this Court said:

> ". . . Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition.* . . ."
>
> *Apex Hosiery Company v. Leader,* 310 U. S. 469, 500.

There is no averment in the amended complaint from which it can be inferred that the public has been in any way damaged by the player regulations.

It is not alleged and cannot be inferred that the player regulations have caused any decrease in the quantity or deterioration in the quality of professional baseball exhibitions available to the public, or any increase in the price charged to the public for admissions to such exhibitions.

IV.

THE COMPLAINT ALLEGES A LABOR DISPUTE WHICH IS EXEMPTED FROM THE ANTI-TRUST LAWS BY PROVISIONS OF THE CLAYTON AND NORRIS-LAGUARDIA ACTS.

Petitioner's grievance is that the Defendants by concerted action have refused to employ him in professional baseball. Such a refusal by employers, whether singly or in concert, to employ any party to a labor dispute is declared by the Clayton and the Norris-LaGuardia Acts (29 U. S. C. §52; 29 U. S. C. §§101-15) not to be considered or held to be in violation of any law of the United States. This is a point which is fatal to Petitioner.

The allegations of the complaint which allege facts claimed to damage the Petitioner reveal nothing more than a controversy between the employe and his employer (and persons associated with the employer) concerning terms and conditions of employment. Petitioner alleges that he was under contract to the Newark International Baseball Club; that the contract was assigned to the Binghamton Club in accordance with baseball rules; that Petitioner refused to report to the assignee club; that for such failure he was placed on the ineligible list; that under an agreement among the baseball clubs, the clubs have agreed not to tender contracts to ineligible players until they are reinstated to the eligible list, and that pursuant to that agreement, the Defendants have refused and still refuse to allow him to play professional baseball [R. 9-11, 13].

We freely concede that the primary object of Congress, both in the Clayton Act and the Norris-LaGuardia Act, was to benefit labor; to make it entirely clear that direct

strikes and secondary boycotts would not subject labor to civil or criminal prosecution under the Sherman Act.

While this undoubtedly was the primary object of Congress, both the wording of the Acts and their legislative history show that there is no doubt that so far as the definition of a labor dispute is concerned the provisions of both Acts were intended to apply equally to employers as well as employees.

Sec. 20 of the Clayton Act (29 U. S. C. §52) provides in part as follows:*

> "And no such restraining order or injunction shall prohibit *any* person or persons, *whether singly or in concert* . . . from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

Section 1 of the Clayton Act (29 U. S. C. §53) provides:

> "The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Plainly, the dispute between Petitioner and Respondents comes within the precise terms of the statute quoted above.

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*The full text of the section is set forth in the Appendix, pages 1-2.

Aside from this specific exemption granted by Sec. 20 of the Clayton Act to the exact conduct charged to the Defendants in this case, Sec. 6 of the Clayton Act and the Norris-LaGuardia Act also exempt from the Sherman Act this dispute arising out of the employer-employee relationship.

It is declared, in Sec. 6 of the Clayton Act:

> "The labor of a human being is not a commodity or article of commerce . . ." (15 U. S. C. §17).

That this section exempts restraints regarding employee services from the operation of the Sherman Act has been expressly held by this Court in the *Apex Hosiery* case, wherein the Court said:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration in §6 of the Clayton Act, 15 U. S. C. §17, that *'the labor of a human being is not a commodity or article of commerce* . . . nor shall such [labor] organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' it would seem plain *that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*"

Apex Hosiery Co. v. Leader, 310 U. S. 469, 502-503.

That this principle laid down in the *Apex Hosiery* case is equally applicable to agreements of employers and employers' associations and to disputes between employers and an employee, is clear from the language both of Sec. 20 of the Clayton Act and the history and provisions of the Norris-LaGuardia Act.

In the report to the Senate of the Norris-LaGuardia Act, it was said:

> "Moreover, it will be observed that this section (Section 6), as do most all of the other prohibitive sections of the bill, *applies both to organizations of labor and organization of capital.* The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees."
>
> Sen. Rep. No. 163, 72nd Cong., 1st Sess. 19 (1932).

Subsections (a) and (c) of Sec. 13 of the Norris-LaGuardia Act (29 U. S. C. §113, (a) and (c)) read as follows:

> "(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) *between one or more employers or associations of employers and one or more employees or associations of employees;* (2) between one or more employers or associations of employers and one or more employers or associations of em-

ployers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

* * * * * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*"

This Court has held that the Sherman Act, Sec. 20 of the Clayton Act and the Norris-LaGuardia Act are three interlacing statutes which are to be read together. *United States v. Hutcheson* (1941), 312 U. S. 219.

When the statutes are so read, it is clear that the dispute here between Petitioner and the Respondents is a labor dispute within the definition of Section 13 of the Norris-LaGuardia Act and Section 20 of the Clayton Act and that accordingly the Respondents in concertedly denying employment to the Petitioner are exempt from the Anti-trust Laws by the specific provisions of Section 20 of the Clayton Act.

Conclusion.

We believe that we have demonstrated:

1. That the *Federal Baseball* case was correctly decided and is applicable to this case;

2. That in any event it should not now be departed from and that any change or amendment to the statutes as they have been construed by this Court should be left to Congress:

3. That even if it be assumed or held that the Court has jurisdiction of the subject matter the amended complaint does not for the reasons set forth in our third point state a claim under the Anti-trust Statutes;

4. That the amended complaint discloses a labor dispute which is specifically exempted under the Clayton and Norris-LaGuardia Acts from the Anti-trust Statutes.

We submit that each of these reasons requires an affirmance of the decisions of the Courts below.

Respectfully submitted,

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APPENDIX.

CLAYTON ACT:

Section 1.

"The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

29 U. S. C. §53.

Section 6.

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

15 U. S. C. §17.

Section 20.

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed

and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

29 U. S. C. §52.

NORRIS-LAGUARDIA ACT:

Section 13.

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

* * * * * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

29 U. S. C. §113(a)(c).